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7911. App.
Dec. 15, 1940

Modified opinion

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
MAY TERM, A. D. 1940

FILED

DEC 3 1940

David P. Mallitt
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

TERM NO. 14

J. B. WILLIAMS,
Plaintiff-Appellant

Appeal from

vs.

T. J. MOSS TIE COMPANY,
Defendant-Appellee

Circuit Court

St. Clair County,

Illinois

AGENDA NO. 8

2161
4

— 307 I.A. 233

STONE, P. J.

Appellant (hereinafter designated as Plaintiff) prosecutes his appeal to this Court from an adverse verdict and judgment rendered in the Circuit Court of St. Clair County, in which plaintiff sought damages for injury to his personal property by reason of a fire alleged to have been communicated by sparks from a steam engine, the property of appellee, (hereinafter designated as defendants).

The plaintiff leased and operated a farm immediately adjacent to the edge of defendant's property, where said defendant operated a tie yard. This was located near the city limits of East St. Louis, in St. Clair county. To haul the ties about the yard, defendant had constructed a narrow gauge railroad track, on which it operated tram cars loaded with ties and pushed by a "dinky" engine.

On plaintiff's farm was situated a barn. The distance from this barn to defendant's railroad track was controverted, the plaintiff's witnesses stating that there was a road between the railroad and the barn just wide enough for a wagon to pass through, while a witness testifying for defendant said it was about forty feet from the barn to the center of the track.

The evidence disclosed that there was a fire which consumed plaintiff's barn and a quantity of hay, corn and farm implements stored therein. Plaintiff's wife and daughter, and Mrs. Addie Mae Brooks, a friend, who was visiting plaintiff's home the day of the fire testified that they saw sparks and fire fly from the smokestack and that shortly thereafter grass and

trash around the barn were burning and the barn caught fire and was consumed. The witness, Mrs. Brooks testified there was nothing on the smokestack of the engine.

The testimony of the engineer, who testified for the defendant was in substance that as he approached the curve, near the barn, he shut off the steam and the trams and the engine coasted around the curve and passed the barn; that the engine did not throw out sparks, and on this particular occasion did not throw out sparks as it approached the barn of the plaintiff. He also testified that the engine was equipped with three anti-spark devices, viz., diagram, sheet screen netting and petticoat pipe, which were regularly inspected. The engineer further testified that on the morning in question there was a fire under a washing kettle between plaintiff's house and the barn, a distance of about twenty-five feet from said barn.

The cause was tried before a jury, which found the defendant not guilty. Plaintiff made a motion for a new trial, which was denied. Counsel for the plaintiff in their brief filed in this court, contends that the verdict and the judgment of the lower court is contrary to the law and against the manifest weight of the evidence; that the trial court erred in admitting certain evidence on behalf of defendant over objection of plaintiff, and that the trial court erred in refusing to give certain instructions to the jury offered by plaintiff and marked "refused" by the court.

The question of whether the fire was ignited by the engine was a question of fact for the jury, and the jury decided such question in the negative. The triers of fact evidently took into consideration the physical condition of the defendant's tie yard and the engineers testimony with reference to the spark arresting device and his further testimony that the engine did not throw out any sparks or fire as it approached and passed the barn. Where there is a contrariety of evidence and the testimony by a fair and reasonable intendment will authorize a verdict, even though it may be supported by a lesser number of witnesses, a court of review will not set it aside. *Carney v. Sheevy* 295 Ill. 78, at 83; *Roth v. Flack*, 224 Ill. App. 396, at 399.

Where a fair question of fact is raised by the proof this Court has consistently held that the jury's finding will not be set aside as against the manifest weight of the evidence. *Summers v. Hendricks*, 300 Ill. App. 498; *Rich v. Albrecht*, 300 Ill. App. 493; *Jones v. Esenberg*, 299 Ill. App. 551; *Gregory v. Merriam*, 294 Ill. App. 483; *Rembke v. Bieser*, 298 Ill. App. 136, at 146; *Greenfield v. Terminal R. R. Co.*, 298 Ill. App. 147, at 153.

This court is of the opinion that the verdict of the jury was not contrary to the manifest weight of the evidence.

It is contended by the plaintiff that the court erred in the admission in evidence of defendant's Exhibit 1, which purported to be a rough sketch or plat of the physical objects mentioned in the testimony. The witness Tebby, who drew it and who identified it, testified that it was approximately correct as to measurements but was not drawn to scale. This sketch was a mode adopted by the witness for locating and giving the relative situation of the various places about which he and the other witnesses were called upon to testify, and which it did not profess to be mathematically accurate, it provided matter of description which was proper for the jury to consider in connection with the other testimony. It was not error to admit the plat in evidence. *Brown vs. Galesburg Pressed Brick Co.* 32 Ill. 648, op. 653.

Even if such plat were technically inadmissible, we are unable to see that its consideration by the jury could have wrought any prejudice to the defendant, certainly none that would justify a reversal. *The People of the State of Illinois v. Steve Jareczak*, 366 Ill. 507, op. 516; *Harlan Gritton v. Illinois Traction, Inc.* 247 Ill. App. 395, op 403; *Edith S. Swency v. Northwestern Mutual Life Ins.* 251 Ill. App. 1, op. 31; *Ethel McClary v. Grand Lodge Brotherhood of R. R. Trainmen*, 282 Ill. App. 77.

Plaintiff complains of the court's action in refusing to give two instructions requested by him which in substance advised the jury that if they believed from a preponderance of the evidence that there was a fire communicated to plaintiff's property by a spark from defendant's engine, then the fact that such fire was so communicated to plaintiff's property from defendant's engine should be taken as full prima facie evidence

to charge the defendant with negligence which must be rebutted by the defendant.

It has been repeatedly held by our court that instructions containing adjectives emphasizing any duty, object or fact, are improper, as being calculated to confuse the jury. *Molly vs. Chicago Rapid Transit Company*, 365 Ill. 164; *Teter vs. Spooner* 305 Ill. 198; *Leiserowitz vs. Fogarty*, 135 Ill. App. 609.

In both of these instructions the word "full" is used, the plaintiff evidently having in mind the language of the statute, with reference to fires caused by locomotives of railroads. Chapter 114, Par. 96, Ill., Rev. Stats., 1939, provides, "That in all actions against any person or incorporated company for the recovery of damages on account of any injury to any property, whether real or personal, occasioned by fire communicated by any locomotive engine while upon or passing along any railroad in this state, the fact that such fire was so communicated shall be taken as full prima facie evidence to charge with negligence the corporation or persons ***** There is no evidence that defendant owned or operated a railroad, under the general railroad laws of the State of Illinois.

It has been held that Section 12, article 11, of the Constitution of Illinois, which provides that "railways heretofore constructed or that may be constructed in this State, are hereby declared public highways and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law," refers to railroads constructed for public as contra distinguished from private use, - to railroads constructed and used as common carriers, and not to such structures built by individuals on their own lands, and to subserve their individual and private interests. *Koelle vs. Knecht* 99 Ill. 396. It necessarily follows that the "regulations prescribed by law," such as those in the Railroad and Warehouses Act, have no application to a private railroad such as that operated by the defendant merely as an incident to the business of creosoting ties. This court is of the opinion that the trial court committed no error in refusing to give these two instructions, which are almost identical.

We find no reversible error in this record and the judgment of the lower court will be affirmed.

AFFIRMED.

Abstract

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
MAY TERM
A. D. 1940

FILED
OCT 28 1940
David G. Mallett
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

TERM NO. 14

AGENDA NO. 8

J. B. WILLIAMS, *270*
Plaintiff-Appellant } Appeal from the
vs. } Circuit Court of
T. J. MOSS-TIE COMPANY, } St. Clair County
Defendant-Appellee. } *3071A2332*

STONE, P. J.

Appellant (hereinafter designated as Plaintiff) prosecutes his appeal to this Court from an adverse verdict and judgment rendered in the Circuit Court of St. Clair County, in which plaintiff sought damages for injury to his personal property by reason of a fire alleged to have been communicated by sparks from a steam engine, the property of appellee, (hereinafter designated as defendants).

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The evidence disclosed that there was a fire which consumed plaintiff's barn and a quantity of hay, corn and farm implements stored therein. Plaintiff's wife and daughter, and Mrs. Addie Mae Brooks, a friend, who was visiting plaintiff's

home the day of the fire testified that they saw sparks and fire fly from the smokestack and that shortly thereafter grass and trash around the barn were burning and the barn caught fire and was consumed. The witness, Mrs. Brooks testified there was nothing on the smokestack of the engine

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The cause was tried before a jury, which found the defendant not guilty. Plaintiff made a motion for a new trial, which was denied. Counsel for the plaintiff in their brief filed in this court, contends that the verdict and the judgment of the lower court is contrary to the law and against the manifest weight of the evidence; that the trial court erred in admitting certain evidence on behalf of defendant over objection of plaintiff, and that the trial court erred in refusing to give certain instructions to the jury offered by plaintiff and marked "refused" by the court.

Counsel for defendant directs the attention of this court, however, to the fact that the errors assigned in the motion for new trial are not set forth in the abstract. The abstract filed by plaintiff merely contains what amounts to a notation to the effect that such motion was made, but does not set out the substance of such motion. In the absence of such errors assigned in the motion, being incorporated in the abstract, the defendant insists that there is nothing for review now before this Court, and request affirmance of the judgment of the trial court, for failure to file a sufficient abstract as required by the rules of

this court.

The abstract is the pleading of the parties in a court of review and whatever is sought to be reviewed must be contained in that pleading. People vs. Paul 167 Ill. App., 557; McGovern v. City of Chicago 202 Ill. App. 139. It has frequently been held by the courts of this State that, where a motion for new trial is filed, only such errors as are specified in such motion may be urged in this court on appeal (Graham vs. Dressen 292 Ill. App., 15, 23, 24; Gunderson vs. First National Bank of Chicago, 296 Ill. App. 111, 113) and where such motion is not set out in the abstract which is filed on appeal, none of the matters sought to be presented in the instant case are properly before this court for review by the court on appeal. Janeway vs. Burton 201 Ill. 78; McGovern vs. City of Chicago 202 Ill. App. 139, 144, 145; Retaj vs. Providers Life Assur. Co., 221 Ill. App. 459, 466, Meyers vs. City of Belleville, 304 Ill. App. 633. In the instant case the errors assigned in the motion for new trial are not set out in the abstract, and this court has no way of knowing the contents of the motion for new trial, without an examination of the transcript of record. In such event the court will not examine the transcript of record for the purpose of finding cause for reversal. Gage vs. City of Chicago, 211 Ill. 109, 112; Meyers vs. City of Belleville, 304 Ill. App. 633.

The plaintiff seeks a reversal and remandment of this cause, and apparently relies chiefly on matters pertaining to the weight of the evidence, error in refusing to give certain instructions requested by plaintiff and error in admitting certain evidence over the objection of plaintiff. Under the authorities hereinabove referred to and in view of the issue raised by defendant, this court is not in a position to disregard the rules of practice with reference to necessity for abstracting matters contained in the motion for new trial and pass on the questions not properly before us.

The judgment of the Circuit Court of St. Clair County will, therefore, be affirmed.

AFFIRMED.

41512

JACOB VONDRASEK, et al.
Appellees.
v.
BERNARD YALE, et al.,
Appellants.

INTERLOCUTORY APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

307 T.A. 234

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendants from two orders, one of August 22, 1940, which enjoined defendants from trespassing on plaintiffs' premises, and the other of August 24, denying the motion of defendants to vacate the injunction. The injunction was interlocutory and for the purpose of preserving the status. The motions were heard on the verified bill, a verified amendment to it and verified answers of defendants to the bill and the amendment.

The facts appearing from the pleadings, disregarding mere conclusions, appear to be that plaintiffs hold title by warranty deed to premises known as 6121-23 S. Wentworth Avenue in the City of Chicago. The rear of these premises is improved by a warehouse four stories high, and the land in front of the warehouse is vacant. Adjoining these premises on the north is a lot improved by a gas station which is operated by defendants, Bernard and Mandel Yale. Prior to November 1, 1939, a right-of-way across the vacant part of plaintiffs' premises was leased to Mr. Adler, who then operated the gas station and who paid plaintiffs \$25 per month for the privilege of permitting customers and Adler to drive across the premises, in other words, to use the same in obtaining access to and egress from the gas station. Adler's lease has expired. Defendants, who succeed Adler at the gas station, nevertheless, continued to use the premises of plaintiffs as a driveway without permission or lease and without paying compensation. Notice to discontinue these trespasses has been given by plaintiffs but has been disregarded not only by the Yales but by other defendants who upon the order of the Yales persist in using the land for the purpose of delivering supplies to defendants. Defend-

3071.A.234

Appellants.

MR. JUSTICE MORTIMER WILLIAMS THE CHIEF OF THE COURT.

This is an appeal by appellants from two orders, one of August 22, 1930, which enjoined defendants from trespassing on plaintiffs' premises, and the other of August 24, denying the motion of defendants to vacate the injunction. The injunction was issued on the basis of the evidence presented by plaintiffs. The evidence was taken on the verified bill, a verified statement to it and verified answers of defendants to the bill and the amendments.

The facts appearing from the pleadings, depositions, and conclusions, appear to be that plaintiffs held title by warranty deed to premises known as 8121-22 E. Commercial Avenue in the City of Chicago. The term of these premises is conveyed by a warranty deed, dated April, and the land in front of the premises is vacant. Plaintiffs have premises on the north in a lot bounded by a gas station which is operated by defendants, between and behind lots. Prior to November 1, 1928, a right-of-way across the vacant part of plaintiffs' premises was leased to Mr. Miller, who then operated the gas station and who paid plaintiffs \$25 per month for the use of the premises and after to give access to and egress from the premises, to use the same in obtaining access to and egress from the gas station. Miller's lease has expired. Defendants, who occupy the premises, nevertheless, continued to use the premises as a driveway without permission or lease and without any compensation. Notice to discontinue these trespasses has been given by plaintiffs but has been disregarded not only by the defendants but by other defendants who upon the order of the chief justice is being issued for the purpose of enforcing plaintiffs' rights.

ants have also placed on the land owned by plaintiffs large tanks which they use for storing oil, etc.

The amendment to the bill alleges that plaintiffs have and will continue to suffer irreparable injury unless an injunction issues as prayed.

Briefs have been filed in this court and the cause was argued orally. In argument the title of plaintiffs and the trespasses by defendants and their customers were admitted. Defendants said they were willing to pay a reasonable amount for the use of the premises but had not been able to agree with plaintiffs as to what a reasonable sum would be. The answer also avers laches and estoppel as a defense because, as it is said, suit was not brought for nine months after the beginning of the trespasses. There is no merit to this contention. Chicago Washingtonian Home v. Chicago, 187 Ill. 414.

It has been argued the court was without jurisdiction because plaintiffs have a remedy at law by way of ejectment or forcible detainer. A suit of either kind, it is apparent, would not provide a complete and adequate remedy. The trespasses of defendants are continuing in their nature and whatever the law may have been in the past it is now settled that trespasses of a continuing nature in order to avoid a multiplicity of suits will be enjoined by a court of equity. Crane v. Levinson, 238 Ill. 69; O'Donnell v. Gearing, 291 Ill. 278 and Taylor v. Pearce, 179 Ill. 145. It was within the discretion of the court to hold matters in statu quo until a hearing could be had upon the writs. Hester Johnson Mfg. Co. v. Goldblatt, 371 Ill. 570. The orders appealed from will be affirmed.

AFFIRMED.

O'Connor, P.J., and McSurely, J., concur.

and have also placed on the land owned by Plaintiff James Jones which they use for storing oil, etc.

The agreement to the bill alleges that Plaintiff have and will continue to suffer irreparable injury unless an injunction issue as prayed.

Defendants have been filed in this court and the same was argued orally. In support of the bill of Plaintiff and the prayer by Defendants and their answers were submitted. Defendants said they were willing to pay a reasonable amount for the use of the premises but had not been able to agree with Plaintiff as to what a reasonable sum would be. The answer also stated that Plaintiff had a balance against, as it is said, said and not brought the same before after the hearing of the testimony. There is no merit in this contention. Chicago & North Western Ry. Co. v. Chicago, 187 Ill. 414.

It has been argued the court was without jurisdiction to issue Plaintiff have a remedy at law by way of ejectment or damages. A writ of either kind, it is contended, would not involve a complete and adequate remedy. The propriety of Plaintiff's contention in their nature and character the law may have been in this case it is not settled that Plaintiff is a continuing injury in order to avoid a multiplicity of suits will be enjoined by a court of equity. Chicago v. Chicago, 187 Ill. 414; Chicago v. Chicago, 187 Ill. 414. It was within the discretion of the court to hold that there is equity and a hearing could be had upon the matter. Chicago & North Western Ry. Co. v. Chicago, 187 Ill. 414. The equity asserted here will be affirmed.

Respectfully,
J. A. and J. A. J. J.

41163

MAHLON D. MILLER, doing business as
Merchants Currency Exchange,
Appellee,

v.

AMERICAN EXPORT LINES, INC., UNITED
STATES FIDELITY AND GUARANTY COMPANY,
J. HENNING, EMIL LEIDICH, INC., ELNEA
BRINKEMPER, COSMOPOLITAN TRAVEL BUREAU,
INC., GLENN WRIGHT, JOURNEYS, INC., W.
R. GRIFFITH, CENTRAL NATIONAL BANK IN
CHICAGO and MANUFACTURERS NATIONAL BANK
OF DETROIT,

Defendants,

APPEAL FROM

CIRCUIT COURT,
COOK COUNTY.

AMERICAN EXPORT LINES, INC., and UNITED
STATES FIDELITY AND GUARANTY COMPANY,
Appellants.

307 I.A. 234²

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal the American Export Lines, Inc., and United States Fidelity and Guaranty Company seek to reverse a decree whereby it was ordered that plaintiff recover from defendant, Central National Bank in Chicago, \$1223.92 and further ordered that the cost of the suit be taxed against defendants, American Export Lines, Inc., United States Fidelity and Guaranty Company and Emil Leidich, Inc.

The undisputed facts are that March 10, 1936, defendant, Emil Leidich, Inc., of Detroit, Michigan, drew its check for \$1223.92 payable to the order of defendant, American Export Lines, Inc., on the Manufacturers National Bank of Detroit. The check was delivered to J. A. Henning, as general agent of the payee, American Export Lines, Inc. He endorsed the check: "Pay to the order of Journeys, Inc. American Export Lines, J. A. Henning, G. A." but did not get the money on the check until some eight or ten days later when it was paid to him by Journeys. Journeys endorsed the check to the Cosmopolitan Travel Service and afterward it was cashed by plaintiff, Miller, who was running a currency exchange business. He deposited it in his bank, the Central National Bank in Chicago, the check was paid in due course and he was given credit by the bank. Afterward the payee, American

WILLIAM B. MILLER, Chief Engineer,
Western Railway Exchange,
Chicago.

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 7. FAX: (415) 435-1234
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 9. BIRTH DATE: 10/10/1945
 10. BIRTH PLACE: SEASIDE, CALIF.
 11. MARRIAGE DATE: 01/01/1968
 12. MARRIAGE PLACE: SEASIDE, CALIF.
 13. DEATH DATE: 01/01/1968
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 107. GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE CITY: SEASIDE, CALIF.
 108. GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE STATE: CALIF.
 109. GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE ZIP: 94062
 110. GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE PHONE: (415) 435-1234
 111. GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE FAX: (415) 435-1234
 112. GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE E-MAIL: J.L.LARSEN@SEASIDE.CA.US
 113. GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE BIRTH DATE: 10/10/1945
 114. GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE BIRTH PLACE: SEASIDE, CALIF.
 115. GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE MARRIAGE DATE: 01/01/1968
 116. GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE MARRIAGE PLACE: SEASIDE, CALIF.
 117. GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE DEATH DATE: 01/01/1968
 118. GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE DEATH PLACE: SEASIDE, CALIF.
 119. GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE: 1000 10TH AVENUE, S.W.
 120. GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE CITY: SEASIDE, CALIF.
 121. GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE STATE: CALIF.
 122. GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE ZIP: 94062
 123. GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE PHONE: (415) 435-1234
 124. GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE FAX: (415) 435-1234
 125. GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE E-MAIL: J.L.LARSEN@SEASIDE.CA.US
 126. GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE BIRTH DATE: 10/10/1945
 127. GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE BIRTH PLACE: SEASIDE, CALIF.
 128. GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE MARRIAGE DATE: 01/01/1968
 129. GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE MARRIAGE PLACE: SEASIDE, CALIF.
 130. GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE DEATH DATE: 01/01/1968
 131. GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE DEATH PLACE: SEASIDE, CALIF.
 132. GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE: 1000 10TH AVENUE, S.W.
 133. GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE CITY: SEASIDE, CALIF.
 134. GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE STATE: CALIF.
 135. GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE GRAVE ZIP: 94062

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482 A. 1706

By this appeal the American Export Lines, Inc., and United States Fidelity and Guaranty Company seek to reverse a decree whereby it was ordered that plaintiff recover from defendant, General National Bank in Chicago, \$1838.32 and further ordered that the cost of the suit be borne equally between plaintiff, American Export Lines, Inc., United States Fidelity and Guaranty Company and Emil Lohdson, Inc.

The complaint reads in part as follows: "Plaintiff, Emil Lohdson, Inc., of Detroit, Michigan, does its cheer for \$1838.32 payable in the order of defendant, General National Bank, Inc., in the sum of \$1838.32 (one thousand eight hundred and thirty eight and 32/100 dollars). The check was delivered to defendant, American Export Lines, Inc., a general agent of the payee, American Export Lines, Inc. He endorsed the check: 'Pay to the order of defendant, Inc. American Export Lines, Inc.' but did not pay the money on the check until some eight or ten days later when it was paid to him by defendant. Defendant endorsed the check to the Commercial Travel Service and afterward it was cashed by plaintiff, William, who was running a currency exchange business. He deposited it in his bank, the General National Bank in Chicago, the check was paid in due course and he was given credit by the bank. Defendant the payee, American

Export Lines, Inc., advised the bank that Menning had no authority to endorse the check and the bank charged Miller's account with the amount of the check. Afterward Miller brought this suit.

Counsel for defendants says: "The American Export Lines, defendant, is engaged in the business of operating a line of steamships between certain ports of the world for the transportation of passengers and freight and in connection with its said business maintained an office in the City of Chicago, which office, on March 10, 1939, and prior thereto, was in charge of defendant, J. A. Menning, as general passenger agent. Mr. Menning had authority to solicit passenger business for the company, and also authority to receive checks and currency and money orders in payment of reservations. He had authority to give the company's receipts for these checks or money orders. He issued the tickets in Chicago and signed them. *** "; that "Menning had no authority to endorse checks made payable to his employer." There is in evidence a letter written by the employer to Menning dated April 28, 1937, in which Menning was told that any checks he received must be forwarded to his employer in New York.

The evidence further shows that at the time Menning endorsed the check to Journeys the latter was in financial difficulty and about eight or ten days thereafter, when Journeys was in funds Menning received \$1,000 in cash, a check for \$160.50 and a draft for \$50. Menning took the \$1,000 in cash and the check for \$160.50 and bought an American Express draft payable to defendant, American Export Lines and forwarded the draft to it in New York City. Menning advised his employer, the American Export Lines, that he was sending this American Express draft in payment of tickets for Mr. and Mrs. Lewis Bennett. The evidence shows that some time prior he had been paid for the Bennett tickets but had failed to turn the money in to the company. He never reported to his employer that he had received the \$1283.92 from Leidish, Inc. in payment of tickets which he sold to Keydel and Huff. Afterward Menning's records were examined and a shortage of \$6,500.26 found.

Afterward Hanning's records were examined and a shortage of \$6,000.00
 belated, Inc. in payment of tickets which he sold to Legel and Holt.
 never reported to his employer that he had received the \$100.00 from
 honest Legel but had failed to turn the money in to the company. He
 The evidence shows that some time prior he had been paid for the
 tickets but in payment of tickets for Legel and Holt. Legel testified
 employer, one American Express Lines, that he was sending this money
 and forwarded the draft to it in New York City. Hanning advised his
 an American Express draft payable to defendant, American Express Lines
 Hanning took the \$1,000 in cash and the check for \$100.00 and handing
 delivered \$1,000 in cash, a check for \$100.00 and a draft for \$50.
 eight or ten days thereafter, when Legel was in Louis Hanning re-
 the check to Legel. The latter was in financial difficulty and about
 The evidence further shows that at the time Hanning observed
 must be forwarded to his employer in New York.

Defendants contend the evidence shows Menning had no authority to endorse the check for \$1223.92 which he received from Leidich, Inc. and therefore no recovery can be had in the instant case and §23 of the Negotiable Instrument Law, chap. 98, Ill. Rev. Stats. 1939 is cited. That section provides: "Where a signature is forged or made without authority, it is wholly inoperative, and no right to retain the instrument or to give a discharge thereof, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the authority or want of authority."

There is considerable argument in the briefs and a number of authorities cited and discussed as to whether Menning had implied authority to endorse the check considering the method in which he conducted the business of the American Export Lines. But we think it is unnecessary to pass on this question for we are of opinion that whether Menning had such authority is not controlling because the undisputed evidence is that Menning sent to defendant, his employer, \$1160.50 of the money he received from the check in question and obviously defendant to that extent was not damaged by Menning's endorsement and cashing of the check. The amount the Export Lines received was \$63.42 less than the amount it should have received from Menning but there is no suggestion that the judgment for plaintiff should be reduced. In these circumstances the judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Matchett, J., and McSurely, J., concur.

Notwithstanding the evidence above presented had no effect
in the absence of the check for \$100.00 which he received from J. J. J.
and therefore no recovery can be had in the instant case and
\$25 of the negotiable instrument law, Chap. 52, Ill. Rev. Stat. 1903
is cited. That section provides: "Where a signature is forged or
made without authority, it is wholly inoperative, and no right to re-
tain the instrument or to give a discharge thereon, or to enforce
payment thereon against any party thereto, can be asserted through or
under such signature, unless the party against whom it is sought to
enforce such right is provided from settling up the negotiable or bank

There is considerable argument in the State and a number of authorities cited and discussed as to whether Kennick had actually to endorse the check considering the action in which he conducted the business of the American Export Lines. But no opinion is necessarily to pass on this question for we are of opinion that whether Kennick had such authority is not controlling because the admitted evidence is that Kennick acted as authorized, his signature, first, to the check is identical with the check as issued and obviously defendant is that check was not changed by Kennick's endorsement and finally at the trial, the expert testimony is to the effect that the amount of the check should have received from Kennick but there is no suggestion that the judgment for plaintiff should be reduced. In these circumstances the judgment of the Circuit Court of Cook County is affirmed.

THE UNIVERSITY OF CHICAGO

NOVEMBER 1960

41174

MASSACHUSETTS MUTUAL LIFE INSURANCE
COMPANY, a Corporation,

Appellee,

v.

MICHAEL J. HANLEY, et al.,

DOROTHY SHERWIN,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

307 I.A. 235

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal Dorothy Sherwin, a judgment creditor of the mortgagors, seeks to reverse a decree of foreclosure.

December 8, 1936, plaintiff filed its complaint to foreclose the lien of a trust deed given to secure an indebtedness of \$85,000. The Hanleys the mortgagors, and others, were made parties defendant and January 13, 1939, plaintiff filed its amended complaint making a number of judgment creditors, including Dorothy Sherwin, parties defendant, she on October 28, 1937, having secured a judgment for \$1425.65 against the mortgagors. July 18, 1935, the mortgagors being in default, assigned the rents to plaintiff, the mortgagee, and it operated the property collecting the rents, making repairs, paying taxes, etc. from that time. The Hanleys, the mortgagors, filed their answer to the complaint in which it was alleged that for a long time prior to the bringing of the foreclosure suit the rents had been assigned to plaintiff and on information and belief the Hanleys averred that the rent collected by plaintiff from the property was more than sufficient to pay the interest and taxes now claimed by plaintiff to be due, and more than the amount with which the mortgagors had been credited. Some months afterward defendant, Dorothy Sherwin, filed her amended answer.

June 12, 1939, Mrs. Sherwin served notice on counsel that she would ask leave to file an intervening petition on behalf of the Chicago Title & Trust Company, as trustee, that it stand as a cross complaint and for rule on all parties to answer "and for other relief

RECEIVED BY THE COURT
CLERK OF THE DISTRICT COURT
OF THE DISTRICT OF COLUMBIA

FILED

RECEIVED BY THE COURT

CLERK OF THE DISTRICT COURT

OF THE DISTRICT OF COLUMBIA

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CLERK OF THE DISTRICT COURT

FILED

80714.987

My this appeal hereby certifies, a judgment entered by the
Court, made to reverse a decree of foreclosure.

December 3, 1935, Plaintiff filed its complaint to foreclose
the lien of a trust deed given to secure an indebtedness of \$25,000.
The mortgagee the mortgagee, and others, were made parties defendant
and January 15, 1936, Plaintiff filed its amended complaint making a
number of judgment creditors, including the mortgagee, parties to the
foreclosure, and on October 22, 1937, having secured a judgment for
\$25,000 against the mortgagee, July 14, 1938, the mortgagee being
in default, assigned the mortgage to Plaintiff, the mortgagee, and it
assigned the property subject to the mortgage to Plaintiff, and it
came, etc. from that time. The mortgagee, the mortgagee, filed their
answer to the complaint in which it was alleged that for a long time
prior to the bringing of the foreclosure suit the mortgagee had been as-
signed to Plaintiff and on information and belief the mortgagee averred
that the debt collected by Plaintiff from the property was more than
sufficient to pay the interest and taxes now claimed by Plaintiff to
be due, and more than the amount with which the mortgagee had been
credited. The mortgagee's answer was filed, and the mortgagee filed
her amended answer.

June 12, 1939, Mrs. Martin served notice on counsel that
she would ask leave to file an intervening petition on behalf of the
Chicago Title & Trust Company, as trustee, that it stand as a cross
complaint and for leave on all parties to answer "and for other relief

prayed for in said petition," and that defendant, Dorothy Sherwin, would ask for a rule upon plaintiff to file an account of all rents collected, copies of which were said to be attached to the notice but they are not in the record. June 14 counsel for Dorothy Sherwin served notice that she would ask leave to file an amended answer, copy of which was said to be attached to the notice but it is not in the record and June 15 an order was entered giving her such leave. The amended answer was filed in which, among other things, it was alleged on information and belief that plaintiff, the mortgagee, had collected the rents from the property in question for a number of years; that if the rents were properly applied the indebtedness sought to be foreclosed would be paid.

The case was referred to a master in chancery who took the evidence, made up his report and found the mortgagors had assigned the rents to plaintiff, who went into possession, collected the rents and made disbursements in the operation of the premises; that Dorothy Sherwin had obtained a judgment in the Municipal court against the mortgagors, as above stated; that she demanded an accounting of the rents and pursuant to defendant's request, plaintiff produced documents showing receipts and disbursements in connection with the operation of the property; that these documents were objected to because they were not the best evidence, the master excluded them and the recommendation was that a rule be entered directing plaintiff to file an account of the receipts and disbursements and that if it failed to do so the bill be dismissed.

Mrs. Sherwin filed objections to the report in that the master, (1) failed to find that the evidence showed the amount due plaintiff was less than the amount it had collected in rents in operating the premises, (2) that the master erred in failing to state the amount and (3) the master erred in finding from the evidence that there was still a small sum due plaintiff.

Plaintiff also filed objections to the master's report, (1) that the master erred in finding it was impossible to state the amount

... for in said position, and that defendant, George ...
... for a vote upon plaintiff's bill on account of all ...
... of which were said to be attached to the notice but
... they are not in the record. There is counsel for George ...
... notice that she would ask leave to file an amended answer, ...
... which was said to be attached to the notice but it is not in the
... record and there is an order was entered giving her such leave. The
... amended answer was filed in which, among other things, it was alleged
... an information and belief that plaintiff, the mortgagee, had collected
... the rents from the property in question for a number of years; that it
... the rents were properly applied the indebtedness would be paid -
... closed would be paid.

The case was referred to a master in summary who took the
evidence, made up his report and found the mortgagee had assigned the
rents to himself, who went into possession, collected the rents and
made disbursements in the operation of the premises; that George
therein had obtained a judgment in the Municipal court against the
mortgagee, on above stated; that the defendant in connection of the
rents and payment to defendant's report, plaintiff's evidence and
amounts showing receipts and disbursements in connection with the
operation of the property; that these documents were objected to be
come they were not the best evidence, the master excluded them and
the recommendation was that a writ be entered directing plaintiff to
file an account of the receipts and disbursements and that it is
failed to do the bill be dismissed.

Now, therein filed objections to the report in that the
master, (1) failed to find that the evidence showed the amount due
plaintiff was less than the amount it had collected in rents in
operating the premises, (2) that the master erred in failing to state
the amount and (3) the master erred in finding from the evidence that
there was still a writ and the plaintiff.
Plaintiff also filed objections to the master's report, (1)
that the master erred in finding it was impossible to state the amount

due from the Hanleys to plaintiff and (2) that the master erred in recommending that a rule be entered directing it to file an account of receipts and disbursements made in the operation of the premises. The objections were overruled and they were ordered to stand as exceptions. The chancellor overruled Mrs. Sherwin's exceptions, sustained the exceptions of plaintiff and January 22, 1940, entered a decree of foreclosure in which it was found there was \$76,313.92 due from the Hanleys, that all other liens against the premises were subordinate to plaintiff's lien and it was decreed that unless the amount found due was paid within three days the property be sold, the proceeds applied and if there was a deficiency the master report the deficiency. If there were a surplus he should also report such surplus and hold it subject to the further order of the court.

Mrs. Sherwin objected to the entry of the decree and the next day, January 23, 1940, filed her notice of appeal in which she specifies her grounds for appeal, some of which are that plaintiff should have been required to render an account of the rents collected; that "The Master has found from the plaintiff's evidence," that it had collected more than \$55,000 for rents from the property and she says the entire indebtedness "has been wiped out by the collection of the rents which plaintiff has received from the premises;" that the decree be reversed "with directions that the trial court find the accounting as follows:". Then follow a number of items which purport to show the amount due plaintiff, \$68,629.36 and "as against the foregoing credit, should be given as follows:". Then follow five items aggregating \$69,661.17, which purport to show the rents collected by plaintiff from the premises and asks that "a new decree be entered ***" and "give full credit for the above and foregoing rents" and that there be no allowance made for plaintiff's solicitors' fees.

As we understand the record, plaintiff's position is that it has given credit for the net amount of rents received from the premises leaving the amount due as found by the decree. The Hanleys,

the from the Hankey to Plaintiff and (2) that the master never in recommending that a rule be entered directing it to file an account of receipts and disbursements made in the operation of the premises. The objections were overruled and they were ordered to attend an exception. The chancellor overruled Mr. Whelan's exceptions, sustained the exceptions of Plaintiff and January 12, 1940, entered a decree of foreclosure in which it was found there was \$78,318.92 due from the Hankey, that all other liens against the premises were subordinate to Plaintiff's lien and it was decreed that unless the amount found due was paid within three days the property be sold, the proceeds applied and if there was a deficiency the master report such surplus and hold it there was a surplus he should also report such surplus and hold it subject to the further order of the court.

Mr. Whelan objected to the entry of the decree and the next day, January 22, 1940, filed an appeal of appeal in which the specific her grounds for appeal, some of which are that Plaintiff should have been required to render an account of the rents collected; that the master had taken from the Plaintiff's collection, and it was alleged that from 1935 to 1939 the master had taken from the Plaintiff's collection the entire indebtedness "has been wiped out by the collection of the rents which Plaintiff has received from the premises"; that the accounting be reversed "with directions that the trial court find the accounting as follows": Then follow a number of items which purport to show the amount due Plaintiff, \$28,500.33 and "be against the foregoing credit should be given as follows": Then follow five items which purport to show the amount due Plaintiff, \$28,500.33 and "be against the foregoing credit" from the premises and asks that "a new decree be entered ***" and "give full credit for the above and foregoing debts" and that there be no balance due the Plaintiff's collection, etc.

As we understand the record, Plaintiff's position is that it has given credit for the net amount of rents received from the premises leaving the amount due as found by the decree. The Hankey,

the mortgagee, made no objection to the decree and do not appeal. Mrs. Sherwin, having alleged in her answer that plaintiff had collected rents sufficient to wipe out the indebtedness due under the mortgage, the burden was on her to prove this allegation. (Boudinot v. Winter, 190 Ill. 394.) She made no such proof but sought to throw the burden on plaintiff and to charge plaintiff with the amount of rents collected without any deduction that plaintiff might be entitled to on account of the operation of the building, making repairs, etc.

We think the chancellor was warranted in overruling Mrs. Sherwin's exceptions to the master's report and entering the decree. If there is a surplus after the sale of the property, the chancellor can award such surplus to Mrs. Sherwin or to any other person entitled thereto.

The decree of the Superior court of Cook county is affirmed.

DECREE AFFIRMED.

Hatchett, J., and McSurely, J., concur.

-4-

the mortgage, made no objection to the action and so not appear. The
petition, having alleged in her answer that plaintiff had collected
rents sufficient to wipe out the indebtedness due under the mortgage,
the burden was on her to prove this allegation. (*Spaulding v. Spaulding*,
100 Ill. 384.) She made no such proof but sought to throw the burden
on plaintiff and to charge plaintiff with the amount of rents collected
without any objection that plaintiff might be entitled to an account
of the operation of the building, asking payment, etc.
It seems that the petition was presented in November 1901.
Plaintiff's exceptions to the answer's report and petition the answer.
It seems as a matter of fact that at the hearing, the petition
was amended such changes to that, should be to any other person entitled
to the same.

The focus of the hearing court at Cook county is attended.

SECOND DIVISION.

Plaintiff, *John J. Spaulding*, vs. Defendant, *John J. Spaulding*.

The first division of the court at Cook county is attended.
The second division of the court at Cook county is attended.
The third division of the court at Cook county is attended.
The fourth division of the court at Cook county is attended.
The fifth division of the court at Cook county is attended.
The sixth division of the court at Cook county is attended.
The seventh division of the court at Cook county is attended.
The eighth division of the court at Cook county is attended.
The ninth division of the court at Cook county is attended.
The tenth division of the court at Cook county is attended.
The eleventh division of the court at Cook county is attended.
The twelfth division of the court at Cook county is attended.
The thirteenth division of the court at Cook county is attended.
The fourteenth division of the court at Cook county is attended.
The fifteenth division of the court at Cook county is attended.
The sixteenth division of the court at Cook county is attended.
The seventeenth division of the court at Cook county is attended.
The eighteenth division of the court at Cook county is attended.
The nineteenth division of the court at Cook county is attended.
The twentieth division of the court at Cook county is attended.

41185

SIGMUND STRAUSS,
Appellee,

v.

ACME SCREEN, GRADE & SASH
COMPANY, a Corporation,
Appellant.

APPEAL FROM

MUNICIPAL COURT,
OF CHICAGO.

307 I.A. 236

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff, the lesser, brought an action of forcible detainer against defendant, his tenant, to recover possession of property covered by the lease. There was a trial before the court without a jury, a finding and judgment in plaintiff's favor and defendant appeals.

Plaintiff has moved to dismiss the appeal on the ground that the notice of appeal was not filed within five days after the rendition of the judgment nor within five days after defendant's motion to vacate the judgment was denied, as required by §18, ch. 57, Ill. Rev. Stats. 1939.

The record discloses that the notice of appeal was served 105 days after the entry of the judgment for possession and 65 days after the denial of defendant's motion to vacate the judgment.

A forcible detainer action is a special statutory proceeding summary in its nature and in derogation of the common law. Sentworth v. Bankstone, 233 Ill. App. 46; City of Chicago v. The Chicago Steamship Lines, Inc., 328 Ill. 309.

The appeal not having been taken within the time limited in §18 of the Forcible Detainer Act, it must be dismissed. Sentworth v. Bankstone, 233 Ill. App. 46; Gholston v. Terrell, 292 Ill. App. 192 (10 N.E. 2nd, 869.).

APPEAL DISMISSED.

Matchett, J., and McSurely, J., concur.

STANDARD CITIZEN

STANDARD

STANDARD CITIZEN
STANDARD CITIZEN
STANDARD CITIZEN

8071A-288

STANDARD CITIZEN

STANDARD CITIZEN, the defendant, brought an action of Tortious Interference against Plaintiff, who brought an action of Tortious Interference against Plaintiff. The action was brought in the Circuit Court of the United States for the District of Columbia. The action was brought in the Circuit Court of the United States for the District of Columbia. The action was brought in the Circuit Court of the United States for the District of Columbia.

STANDARD CITIZEN has moved to dismiss the action on the ground that the notice of appeal was not filed within five days after the rendition of the judgment nor within five days after defendant's motion to vacate the judgment was denied, as required by 118, ch. 87, 111. Rev. Stat. 111.

The record discloses that the notice of appeal was served 109 days after the entry of the judgment for possession and 89 days after the denial of defendant's motion to vacate the judgment. A Tortious Interference action is a special statutory proceeding summary in its nature and its determination of the common law. Standard Citizen v. Standard Citizen, 225 Ill. App. 2d 111. App. 2d 111. App. 2d 111.

The appeal not having been taken within the time limited in 118 of the Tortious Interference Act, it must be dismissed. Standard Citizen v. Standard Citizen, 225 Ill. App. 2d 111. App. 2d 111. App. 2d 111.

The appeal not having been taken within the time limited in 118 of the Tortious Interference Act, it must be dismissed. Standard Citizen v. Standard Citizen, 225 Ill. App. 2d 111. App. 2d 111. App. 2d 111.

STANDARD CITIZEN

STANDARD CITIZEN, Plaintiff, vs. STANDARD CITIZEN, Defendant.

41205

JAMES L. LAWLER,

Appellee,

v.

L. H. MOTORS, INC.,
a Corporation,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

307 I.A. 236²

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendant to recover damages for personal injuries claimed to have been sustained by him on account of the negligence of one of defendant's agents in driving an automobile. There was a jury trial, a verdict and judgment in plaintiff's favor for \$1350, and defendant appeals.

The record discloses that about two o'clock on the afternoon of April 3, 1937, plaintiff, who was then about 37 years old and had been employed for some time as chief claim examiner for the Lumbermens Mutual Casualty Company, went to defendant's place of business located at Sheridan road and Lawrence avenue, Chicago, to see about buying an automobile. William H. Becker, who was then about 38 years old, one of defendant's employees, took plaintiff in an automobile to demonstrate the working of the make of car which plaintiff was contemplating purchasing.

Plaintiff's theory of the case is that he was sitting on the seat at the right hand of Becker who was driving the automobile at about 30 miles an hour, south in Broadway, and when they had gone a block to the next cross street, Becker applied his brakes, the car stopped suddenly and plaintiff was thrown against the windshield, injuring his head and shoulder.

On the other side, defendant's theory is that as the automobile approached the first cross street, it was going about 3 miles an hour and came to a gentle stop; that "plaintiff was sitting off balance and fell against the windshield, and that there was a very slight injury, if any."

ALIAS

JOHN L. CLARK

WILLIAM H. HOOKER

WILLIAM H. HOOKER

WILLIAM H. HOOKER

WILLIAM H. HOOKER

J. E. HOOKER, JR.
A. HOOKER, JR.

WILLIAM H. HOOKER

3071A.236

Plaintiff brought an action against defendant to recover

damages for personal injuries claimed to have been sustained by him on account of the negligence of one of defendant's agents in driving an automobile. There was a jury trial, a verdict and judgment in plaintiff's favor for \$1,000, and defendant appeals.

The record discloses that about two o'clock on the afternoon of April 3, 1937, plaintiff, who was then about 37 years old and had been employed for some time as chief claim examiner for the Industrial Mutual Casualty Company, went to defendant's place of business located at Sheridan road and Lawrence avenue, Chicago, to see about buying an automobile. William H. Hooker, who was then about 35 years old, one of defendant's employees, took plaintiff in an automobile to examine the working of the make of car which plaintiff was contemplating purchasing.

Plaintiff's theory of the case is that he was sitting on the seat at the right hand of Hooker who was driving the automobile at about 30 miles an hour, south in Broadway, and when they had gone a block to the next cross street, Hooker applied his brakes, the car stopped suddenly and plaintiff was thrown against the windshield, injuring his head and shoulder.

On the other side, defendant's theory is that at the time while approaching the first cross street, it was going about 3 miles an hour and when to a point where plaintiff was sitting on the balance and fell against the windshield, and that there was a very slight injury, if any.

The two men who were in the automobile testified, plaintiff's testimony tending to support his theory of the case while the testimony of the driver of the car, Becker, supported defendant's theory of the case. There was also a dispute in the evidence as to whether the brakes of the automobile were in good condition.

Defendant contends the verdict is against the manifest weight of the evidence, should be set aside and the judgment reversed. We have considered the testimony of the two witnesses on this question and are of opinion we would not be warranted in disturbing the verdict in plaintiff's favor, approved as it was by the trial judge, on the ground that the verdict is against the manifest weight of the evidence.

Defendant further contends the judgment is excessive; that plaintiff suffered little or no injuries and was only laid up about three days.

The accident happened between two and three o'clock on the afternoon of April 3, which was Saturday. Plaintiff's evidence is to the effect that after he was thrown against the windshield he became nauseated - that he was dazed; that Becker, the driver, a few minutes after the car stopped asked him how he felt; that he replied he was dizzy and stunned; that they then drove around a block or two and then plaintiff took the wheel and drove a short distance to the gas station, the place from which they had started; that he sat down on the front bumper five or ten minutes, then got in his own car which he had parked nearby and started to his home in Evanston. He drove over to the Loyola elevated station, about two miles from plaintiff's place of business, stayed there awhile but feeling ill he left his car, got into a Yellow Cab and was driven to his home in Evanston [about two miles]; that "I lay down awhile feeling the same way." That Dr. Weiss came to see him later on Saturday afternoon and prescribed heat to the shoulder, ice bag to the head, and a sedative, nembutol. The doctor came Sunday, Monday and Tuesday, taped his right shoulder and told him to stay at home and lie down; that he returned to work on Thursday morning following the accident. "Several times after that I came down

The two men who were in the automobile testified, during
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The accident happened between two and three o'clock on the afternoon of July 2, which was Saturday. Plaintiff's witness is the effect that after he was thrown against the windshield he became unconscious - that he was dazed; that he, the driver, a few minutes after the car stopped asked his man to tell; that he replied he was dizzy and stunned; that they then drove around a block or two and then Plaintiff took the wheel and drove a short distance to the gas station, the place from which they had started; that he and some of the front bumper five or ten minutes, then got in his own car which he had parked nearby and started to his home in Evanston. He drove over to the Loyola elevated station, about two miles from Plaintiff's place of business, stayed there awhile but feeling ill he left his car, got into a Yellow Cab and was driven to his home in Evanston (about two miles); that "I lay down awhile feeling the same way". That he, the witness, came to see him later on Saturday afternoon and described him as the shoulder, ice bag to the head, and a sedative, morphine. The doctor came Sunday, Monday and Tuesday, taped his right shoulder and told him to stay at home and lie down; that he returned to work on Thursday morning following the accident. "Several times after that I came down

late and left the office early. I lost altogether the total of ten days, including part days;" that for a few weeks he had an extremely sore back, blinding headaches and his right shoulder was sore; that afterward he went to see the doctor a number of times. The doctor gave him some heat treatments for the shoulder; that he had a bad accident in October, 1934. "The principal injury was a crushing injury to my left side near the back bone, about six or eight ribs were crushed. There was injury to my right shoulder and to my head;" that he was making \$300 a month; that he saw Dr. Weiss several weeks after the accident.

Dr. Weiss testified he saw plaintiff April 3, examined him; that the subjective symptoms "were nausea, he complained of dizziness, haziness, severe headache, pain in the right shoulder and right chest." That the objective findings were moderate shock, fast pulse, "profuse perspiring, large hematoma on the right forehead, tenderness over the right shoulder, and the upper right chest." That his diagnosis was "cerebral concussion and sprain of the right shoulder and the muscles of the neck and right side;" that he prescribed heat for the shoulder, an ice pack for the head and a sedative; that he afterward saw plaintiff a number of times at plaintiff's home and at the doctor's office when he "gave him massage and diathermy to the right shoulder;" that he examined the plaintiff two weeks before the trial which began Monday, September 11, 1939 [two and one-half years after the accident], and "detected evidence of crepitation in the shoulder joint, a crackling sensation imparted to the ear through the stethoscope" and gave as his opinion that the injury received might or could cause plaintiff's condition; that in his opinion plaintiff's present condition was permanent "Because there is apparently damage to the structures of the shoulder joint" and that plaintiff paid him \$100 in August, 1938.

Upon a consideration of all the evidence in the record we are of opinion we would not be warranted in disturbing the verdict on

the ground that the damages assessed were excessive.

The defendant contends "There was serious error in the court's rulings as to medical evidence." The doctor was asked to explain "cerebral concussion." There were some objections back and forth and the witness's answer stricken out.

Further complaint is made to the testimony of the doctor, that he found there was a creaking of plaintiff's shoulder and the doctor gave his opinion that the injury might or could cause plaintiff's condition. The errors, if any, were clearly not reversibly erroneous.

Defendant further contends the court erred in giving an instruction at plaintiff's request. The instruction told the jury that if they found in plaintiff's favor that he had sustained injuries as alleged in his complaint and, as a direct cause thereof, "he was unable for a period of time to work or engage in his usual occupation, then the fact that his employer continued to pay him his wages or salary during such period is not to be considered by you in assessing the plaintiff's damages, if any, because the gratuitous payment in such circumstances" would not preclude recovery. It is said the instruction was erroneous because "it assumes that there were gratuitous payments, and though the man was off work only three days the jury from the language of the instruction might assume that they could assess damages for a long period of time while the plaintiff was unable to perform his full duties, though he may have been on the job and receiving full pay."

We think the giving of the instruction does not warrant a reversal. O'Brien v. Chicago City Ry. Co., 305 Ill. 244; Reebler v. Voelgel, 246 Ill. App. 69. In the O'Brien case the court said: "No injustice is done to a person negligently injuring another in requiring him to pay the full amount of damages for which he is legally liable without deduction for compensation which the injured person may receive from another source which has no connection with the negligence, whether that source is a claim for compensation against his employer,

the ground that the damages assessed were excessive.

The defendant contends "there was serious error in the

court's reliance on its medical evidence." The doctor was asked to ex-

plain "cerebral commotion." There were some objections made and

forth and the witness's answer was as follows:

Further complaint is made for the testimony of the doctor,

that he found there was a stretching of plaintiff's shoulder and the

doctor gave his opinion that the injury might or would cause plaintiff's

condition. The error, it may, have already been repeatedly stated.

Defendant further contends the court erred in giving an

instruction as plaintiff's request. The instruction said that if any

if they found in plaintiff's favor that he had sustained injuries as

alleged in his complaint and, as a direct cause thereof, "he was un-

able for a period of time to work or engage in his usual occupation,

then the fact that his employer continued to pay him his wages or

salary during such period is not to be considered by you in assessing

the plaintiff's damages, if any, because the defendant's payment in

such circumstances would not constitute payment. It is said that the

instruction was erroneous because it stated that there were questions

presented, and hence the law was not to be applied until the jury

from the language of the instruction might assume that they could

assess damages for a long period of time while the plaintiff was un-

able to perform his full duties, though he may have been on the job

and receiving full pay."

We think the giving of the instruction does not warrant a

reversal. Winters v. United Fruit Co., 104 Cal. 441, 442, 443.

Yoshida, 202 Cal. 441, 442, 443. In the Yoshida case the court said:

injustice is done by a person negligently inflicting another's in-

curring him to pay the full amount of damages for which he is legally

liable without reduction for compensation which the injured person may

receive from another source which has no connection with the negligence,

whether that source is a state for compensation against his employer,

a policy of insurance against accidents, a life insurance policy, a benefit from a fraternal organization or a gift from a friend."

Moreover, we think the amount plaintiff received for the three or ten days he did not work is trivial and ought not to work a reversal.

The judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Matchett, J., and McSurely, J., concur.

a policy of insurance against accidents, a life insurance policy, a benefit from a fraternal organization or a gift from a friend."

However, as these are merely illustrative of the various ways in which the gift tax is levied, it is not intended to be exhaustive.

The judgment of the superior court of Cook county is

affirmed.

Respectfully submitted,

Charles E. Smith, Attorney at Law, Chicago, Ill.

41181

FOOTE BROTHERS GEAR AND MACHINE
CORPORATION, a Corporation,
Appellee,

MAPLEOOD MACHINERY CO., INC., a
Corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

307 I.A. 237

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant appeals from an adverse judgment of \$1755.40 entered upon a verdict directed by the court.

Plaintiff's statement of claim alleged the sale by it to defendant of a number of "worm gear reducers complete with motors;" that these were shipped to defendant; that the total amount of the shipments for which defendant has failed to pay the plaintiff amounts to \$1755.40. Defendant filed an amended affidavit of defense, and counterclaim for damages; the court on motion struck the counterclaim of defendant and the case went to trial. The judge ruled that defendant must first proceed with its evidence. No evidence was offered by plaintiff, and at the close of the evidence offered by defendant a peremptory instruction was given to the jury to find for plaintiff for the amount claimed and judgment was entered against defendant.

Stated briefly the affidavit of defense and counterclaim alleged that defendant purchased from plaintiff a sample motor and gear reducer for a specific purpose which was made known to the plaintiff; that the motor and reducer were required "to pull 30 gage material;" that the sample purchased performed this work but that thereafter, with the exception of two of the twenty-four motors and gear reducers purchased by defendant, to equal the sample, they did not operate or perform the work as the sample had done; that plaintiff was notified of the failure of these units to work properly and, at the request of plaintiff, fourteen of these were returned by defendant to plaintiff; that certain of the machines in which these units had been installed were sold by defendant at a greatly reduced price by reason of these defects; that representatives of plaintiff saw the units in

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LIBRARY

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„Jedno z nich jest niebezpiecznym i mrocznym stworzeniem

Plaintiff's statement of claim alleged the sale to be

defendant of a number of "how many" requests complete with answers; that these were shipped to defendant; that the total amount of the shipments for which defendant has failed to pay the plaintiff amounts to \$1754.40. Defendant filed an amended affidavit of defense, and counterclaim for damages; the court on motion struck the counterclaim of defendant and the case went to trial. The judge ruled that defendant must first proceed with its evidence. No evidence was offered by plaintiff, and at the close of the evidence offered by defendant a peremptory instruction was given to the jury to find for plaintiff for the amount claimed by defendant and against plaintiff defendant.

stated briefly the affidavits of defense and counterclaim

of these defects; that representatives of plaintiff saw the unit in installed were sold by defendant at a greatly reduced price by reason plaintiff; that certain of the machines in which these units had been request of plaintiff, fourteen of these were returned by defendant to notified of the failure of these units to work properly and, at the expense or return the unit as the engine had done; that plaintiff was returned purchased by defendant, to equal the engine, they did not other, with the exception of two of the twenty-four engines and gear serial; that the engine purchased performed this work and that there- with; that the motor and pump were repaired "to pull 20 tons and gear request for a specific purpose which was made known to the plain- alleged that defendant purchased from plaintiff a specific motor and

operation and admitted they were not according to the sample. The counterclaim contained an itemized statement of damages claimed by defendant on account of the failure of the units purchased to operate properly.

Plaintiff argues that the court properly struck this counterclaim as it did not fully and specifically allege ultimate facts and the items of damage. Inspection of the counterclaim does not support this charge as the items claimed are fully and specifically itemized.

Plaintiff says the theory of the counterclaim was inconsistent with the theory of the statement of defense. There is no merit in this. The counterclaim adopts the allegations contained in the statement of defense and there is no inconsistency between the denial of the amount claimed to be due and the claim of damages accruing to defendant because of the imperfect units subsequently delivered to defendant. It was error to strike the counterclaim.

Defendant complains of the action of the trial court in requiring it to proceed first with its evidence. Plaintiff introduced no evidence. A defendant is properly required to introduce its evidence first when a prima facie case for the plaintiff has been established. Santa Rosa-Vallejo Tanning Co. v. Kronauer, 238 Ill. App. 236. Here the plaintiff's statement of claim alleged the purchase and delivery by it to defendant of units at the prices specified in the statement, with an affidavit that the total amount due for these shipments was \$1755.40. The affidavit of defense merely denies that there is due plaintiff this amount but does not deny the purchase, shipments or prices. Section 40 of the Practice act (chap. 110) requires that "every answer and subsequent pleading shall contain an explicit admission or denial of each allegation of the pleading to which it relates." Under these pleadings plaintiff established a prima facie case and the burden then was upon defendant to establish an affirmative defense.

Plaintiff says defendant did not return any of these units said to be imperfect. The evidence, however, shows that these were

[illegible]

delivered to the manufacturer of them as requested by plaintiff.

There were a number of questions of fact which should have been submitted to the jury for determination. Defendant contends that some of the units worked according to the sample but there were questions of fact concerning other units as to whether they worked according to sample and whether this caused expense and damage to defendant, and whether they were returned by defendant. Defendant had a right to accept the units which worked and to reject those which did not work, with ensuing damages.

Many technical points are raised concerning the pleadings and competency of evidence upon which it is unnecessary to comment. The controlling controverted points relate to the facts, which should be submitted to a jury.

The judgment is therefore reversed and the case remanded for a new trial.

REVERSED AND REMANDED.

O'Connor, P.J., and Hatchett, J., concur.

delivered to the jury as requested by plaintiff.
There were a number of questions of fact which should have
been submitted to the jury for determination. Defendant conceded
that some of the units worked according to the sample but there were
questions of fact concerning other units as to whether they worked
according to sample and whether this caused expense and damage to
defendant, and whether they were returned by defendant. Defendant
had a right to keep the units which caused and to reject those
which did not work, with ensuing charges.
Many technical points are raised concerning the findings
and competency of evidence upon which it is necessary to proceed.
The controlling controverted points relate to the facts, which should
be submitted to a jury.
The judgment is therefore reversed and the case remanded
for a new trial.

REVEREND AND HONORABLE,

Witness my hand and seal this 1st day of January,

41191

FRANK J. HART,

Appellant,

v.

JOSEPH S. DUNCAN,

Appellee.

APPEAL FROM

SUPREME COURT,

COLE COUNTY

MR. JUSTICE McSURREIN DELIVERED THE OPINION OF THE COURT.

307 I.A. 237²

Plaintiff was employed by defendant as secretary for some ten years; the employment terminated in September, 1939; plaintiff then brought this suit seeking to recover \$41,136.46 as additional compensation for services rendered by him alleged to be outside the scope of his duties under his contract of employment. Plaintiff's second amended complaint upon motion of defendant was dismissed; plaintiff asked leave to file an amendment to his second amended complaint, which motion was denied. He appeals from these orders.

The motion to dismiss asserted that the services rendered by plaintiff were within the scope of his employment; that there was no express or implied promise by defendant to pay plaintiff any extra compensation and that the claim is barred by the statute of limitations.

In 1927, defendant advertised in the Chicago Tribune for a "Secretary;" information was requested as to experience, references and salary expected; the advertisement further stated - "Young man who has some knowledge of bookkeeping and stenography and, preferably, had some experience in the buying and selling of bonds and stocks." Plaintiff replied to this, writing a letter, stating that he had been employed for fourteen years as secretary to a Mr. Mend who dealt largely in securities, trading constantly, taking profits and making changes in his list. Plaintiff further stated in his letter that he had devised a record system which had received favorable comments from banks, brokers and bond men; that he executed all trades that Mr. Mend made, looking after his interests and dividend payments, his correspondence and banking, and performed "other secretarial duties too numerous to

TABLE 1. EAST

W.

TABLE 1. SOUTH

TABLE 1. WEST

Plaintiff was employed by defendant as secretary for some ten years; the employment terminated in September, 1933; Plaintiff then brought this suit seeking to recover \$21,156.40 as additional compensation for services rendered by him alleged to be outside the scope of his duties under his contract of employment. Plaintiff's second amended complaint upon motion of defendant was dismissed; Plaintiff asked leave to file an amendment to his second amended complaint, which motion was denied. He appeals from these orders. The motion to dismiss asserted that the services rendered by Plaintiff were within the scope of his employment; that there was no express or implied promise by defendant to pay Plaintiff any extra compensation and that the claim is barred by the statute of limitations.

In 1927, defendant advertised in the Chicago Tribune for a "secretary"; application was requested as an experienced, well-known and salary expected; the advertisement further stated - "Young man who has some knowledge of bookkeeping and stenography and, preferably, had some experience in the buying and selling of bonds and stocks." Plaintiff replied to this, writing a letter, stating that he had been employed for fourteen years as secretary to a Mr. Bond who dealt largely in securities, trading constantly, making profits and losing losses in his line. Plaintiff further stated in his letter that he had received a second system which had received favorable comments from Bond, who was and Bond said: that he expected all trades that Mr. Bond made, looking after his interests and dividing proceeds. His correspondence was denied, and returned "other secretarial duties too numerous to

mention here." To this defendant replied saying that the "experience you have had seems to be very much in line with the work I have in mind for you."

An interview followed in which plaintiff again detailed his work as assistant to Mr. Mond. Defendant stated that if he employed plaintiff he would expect plaintiff to study reports of financial services, call defendant's attention to any recommendation that appeared therein concerning securities and to assist defendant in making his selection of securities. Defendant then proposed to pay plaintiff \$75 a week for his services, to which plaintiff replied that he hoped he might be entitled to more in the future if his work was satisfactory.

Plaintiff's complaint itemizes four services performed by him for defendant which plaintiff claims were extra or additional services to those covered by the terms of his employment. The first item is the preparation of income tax returns for defendant and his wife. Practically all of the information necessary for the preparation of these income tax returns would be found in the accounts which plaintiff was required to keep. The tax returns would be taken from these accounts and would require the usual secretarial work.

Plaintiff claims he was entitled to additional compensation for his services in connection with the Andes Copper Mining securities; that while defendant was away a broker urged plaintiff to cable defendant to sell at a certain figure all the debentures of this company; that plaintiff had special and confidential information as to the value of these debentures and did not advise defendant to make such sale; that thereafter they were converted into stock which was sold at a profit of over \$16,000 for defendant. Plaintiff claims \$5000 as additional compensation for such services.

Another item of service for which plaintiff claims additional compensation is the giving by plaintiff to defendant of information concerning the value of securities in the Tax Security Corporation whereby defendant recovered a substantial amount in settlement. Plain-

mention here. To this defendant replied saying that the "expenses" you have had seems to be very much in line with the work I have in mind for you."

An interview followed in which plaintiff again detailed his work as assistant to Mr. Bond. Defendant stated that if he employed plaintiff he would expect plaintiff to study records of financial services, call defendant's attention to any recommendations that appeared therein concerning securities and to assist defendant in making his selection of securities. Defendant then proposed to pay plaintiff \$75 a week for his services, to which plaintiff replied that he might be entitled to more in the future if his work was satisfactory.

Plaintiff's complaint alleges four services rendered by him for defendant which plaintiff claims were extra or additional services to those covered by the terms of his employment. The first item is the preparation of income tax returns for defendant and his wife. Practically all of the information necessary for the preparation of these income tax returns would be found in the accounts which plaintiff was required to keep. The tax returns would be taken from these accounts and would require the usual clerical work.

Plaintiff claims he was entitled to additional compensation for his services in connection with the Golden Copper Mining Association. That while defendant was away a broker urged plaintiff to cable defendant to sell at a certain figure all the debentures of this company; that plaintiff had special and confidential information as to the value of these debentures and did not advise defendant to make such sale; that thereafter they were converted into stock which was sold at a profit of over \$15,000 for defendant. Plaintiff claims \$1500 as additional compensation for such services.

Lastly, now as to services for which plaintiff claims additional compensation is the giving by plaintiff to defendant of information concerning the value of securities in the Tax Security Corporation. Through defendant recovered a substantial amount in settlement. Plaintiff

tiff claims an additional compensation of \$5000 for this service.

Plaintiff next alleges he learned that bankruptcy proceedings were pending against the McEllan Stores Company, a Delaware corporation; that after making diligent search plaintiff concluded that the market value of the stock was far below its intrinsic value. Plaintiff thereupon persuaded defendant to purchase some of the stock of this company and from this purchase realized a large profit. Plaintiff claims \$26,136.46 as additional compensation.

We are of the opinion that all of these services were within the scope of plaintiff's employment. He was required to keep accounts of all bonds, stocks and securities owned or acquired by defendant or his wife; also to perform all clerical work in connection with the purchase and sale of all bonds and stocks. It was part of plaintiff's duties to call defendant's attention to information appearing in the financial reports relating to securities. In the letter which plaintiff wrote in answer to defendant's advertisement, plaintiff related in detail the character of his services to Mr. Rand, his former employer. These describe the activities of Mr. Rand with reference to securities, and plaintiff set forth his familiarity with these activities; that in addition to keeping the account of Mr. Rand's securities he executed all trades in these securities. It is convincingly shown in the letter by plaintiff to defendant and in the conversation between the parties as to the duties and terms of employment, that all of the matters for which additional compensation is sought were fully covered and included in plaintiff's duties.

Plaintiff cites cases where it has been held that where extra services are performed entirely without the sphere of the service for which the contract was made, the law will imply an agreement for extra compensation. In Mathison v. N. Y. C. & N. H. Co., 76 N.Y.S. 39, an employee's duties required him to inspect engines and run them in cases of emergencies; he was requested to and did run a switch engine four or five times each day for about sixteen months; he

...it claims an additional compensation of \$5000 for this service.
...plaintiff next alleges he learned that defendant was
...defendant was working against the defendant's interest, a witness
...corroborated that after seeing defendant's affidavit submitted
...that the market value of the stock was far below its intrinsic value,
...plaintiff thereupon purchased defendant's shares at a price of \$100 per share
...of this company and from this purchase realized a large profit. Plaintiff
...it claims \$25,000 as an additional compensation.
...he was of the opinion that all of these services were within
...the scope of plaintiff's employment. He was required to keep accounts
...of all bonds, stocks and securities owned or acquired by defendant or
...his wife; also to perform all clerical work in connection with the
...purchase and sale of all bonds and stocks. It was part of plaintiff's
...duties to call defendant's attention to important matters in the
...financial reports relating to securities. In the letter which plain-
...tiff wrote in answer to defendant's advertisement, plaintiff related
...in detail the character of his services to Mr. Bond, his former em-
...ployer. There described the activities of Mr. Bond with reference to
...securities, and plaintiff set forth his familiarity with these
...activities; that in addition to keeping the account of Mr. Bond's
...securities he executed all orders in these securities. It is con-
...vincingly shown in the letter by plaintiff to defendant and in the
...conversation between the parties as to the duties and nature of em-
...ployment, that all of the matters for which additional compensation is
...sought were fully covered and included in plaintiff's duties.
...plaintiff cites cases where it has been held that where
...extra services are performed entirely without the scope of the
...service for which the contract was made, the law will imply an agree-
...ment for some compensation. In Wheeler v. W. H. S. & Co.,
...70 N.E. 2d, an employee's duties required him to inspect engines and
...run them in case of emergency; he was requested to run the en-
...gines four or five times each day for about sixteen months; he

brought suit for extra compensation for the additional services of running the switch engine and obtained judgment in the trial court; this was reversed upon appeal and the court well stated the principle controlling. After noting that the law would imply an agreement for extra compensation, the opinion says, "This rule is based upon the probability that for such service there was an intention on the part of the master to pay extra compensation, upon which the servant might rely. But this rule must be cautiously applied, and the service must be so far outside of the sphere of the employment as to indicate a probable intention on the part of the master to allow extra compensation therefor. If the question be one of doubt, the right to extra compensation should rest only upon an express agreement. Any other rule of law would introduce dangerous uncertainty and instability into all contracts of service." This was followed in Murray v. John Griffiths & Son, 95 N.Y.S. 573, where it was said that proof of a new agreement to pay extra compensation was essential; that "To hold otherwise would be to require employers to have specifically enumerated and definitely catalogued, at the time of the hiring, every simple service the proposed employe might be called upon to perform, lest ingenuity could subsequently differentiate between services, so as to create additional liabilities." To the same effect are Voorhees v. Executors of Woodhull, 33 N.J.L. 494, and Robinette v. Hubbard Coal Mining Co., 98 W. Va. 514, 519.

It is undoubtedly true, as stated by plaintiff's counsel, that the motion to dismiss admits the truth of all allegations in the complaint which are well pleaded, but this admits only the facts stated in the complaint to be true and does not admit that the plaintiff is entitled to recover. Whalen v. Twin City Barge & Gravel Co. 280 Ill. App. 596, 610.

Plaintiff claims extra compensation for services rendered over a period of ten years, during which time he received his regular salary and made no claim of any kind that he was entitled to any further compensation. In Levi v. Reid, 91 Ill. App. 430, plaintiff sought

present suit for extra compensation for the additional services of running the engine and obtaining judgment in the trial court; this was reversed upon appeal and the court well stated the principle controlling. After noting that the law would imply no recovery for extra compensation, the opinion says, "This rule is based upon the probability that for such services there was an imputation on the part of the master to pay extra compensation, upon which the servant might rely. But this rule must be cautiously applied, and the parties must be so far outside of the sphere of the employment as to indicate a probable intention on the part of the master to allow extra compensation therefor. If the question be one of doubt, the claim is denied. Compensation should rest only upon an express agreement. Any other rule of law would introduce dangerous uncertainty and instability into all contracts of service." This was followed by Harmon v. Cook, 20 N.H. 401, 21 N.H. 402, where it was said that proof of a contract to pay extra compensation was essential; that "To hold otherwise would be to require employers to have specially communicated and definitely established, at the time of the hiring, every single service the proposed employee might be called upon to perform, lest afterwards could subsequently distinguish between services, so as to create additional liabilities." To the same effect are Yorke v. Woodcock, 22 N.H. 404, and Wright v. Wright, 23 N.H. 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

extra compensation above his salary for alleged extra work in the evenings and on Sundays; on appeal the judgment in his favor was reversed, the court saying plaintiff did not himself regard his employer as under any contract liability, as "shown by his conduct in keeping a secret account and making no mention of it to his employer until his employment was ended." In Hess v. Gardin, 79 N.Y. 84, it was held that where services are rendered by one in the employ of the person for whom they were rendered "the law implies that the services were rendered under the contract of employment, unless the contrary be shown, and this implication is much stronger if the services are of the same character as those embraced in the contract." Other cases to the same effect are Cooper v. Brooklyn Trust Co., 96 N.Y. 56 and Heideman v. Bolger, 65 Ill. App. 658.

In Sowash v. Emerson, 32 Cal. App. 13, cited by plaintiff, the facts are quite different from those in the case at bar. There there was no relation of employer and employee between the parties; plaintiff agreed to furnish the deceased with room and board; afterward becoming helpless, plaintiff did the work of a nurse for the deceased. It was held that the nursing services were entirely outside the original contract.

Plaintiff argues that he should have been allowed to file his amendment to his second amended complaint. The amendment suggested was that plaintiff "informed" defendant he expected compensation for his alleged extra services. It should be noted that neither in the original complaint nor in the first amended complaint, was there any allegation that plaintiff had "intimated" or "informed" defendant of any expectation of additional compensation. The proposed amendment was clearly in conflict with the allegations set out in the previous complaints. The court did not abuse his discretion in denying this motion. Rubin v. Chicago Title & Trust Co., 249 Ill. App. 486, 489.

We are also of the opinion the statute of limitations was a good defense. Plaintiff was employed for an indefinite period at a weekly salary and plaintiff had a claim against defendant for this at

extra compensation above his salary for alleged extra work in the evenings and on Sundays; on appeal the judgment in his favor was reversed, the court saying plaintiff did not himself testify his employer was under any contract liability, as "shown by his conduct in keeping a secret account and making no mention of it to his employer until his employment was ended." In Boyd v. Boyd, 75 N.Y. 2d, it was held that where services are rendered by one in the capacity of the owner for whom they were rendered "the law implies that the services were rendered under the contract of employment, unless the contrary is shown, and this implication is much stronger if the services are of the same character as those rendered in the contract." Other cases to the same effect are Boyd v. Boyd, 75 N.Y. 2d, 100 and Boyd v. Boyd, 75 N.Y. 2d, 101.

In Boyd v. Boyd, 75 N.Y. 2d, 101, cited by plaintiff, the facts are quite different from those in the case at bar. There there was no relation of employer and employee between the parties; plaintiff agreed to furnish the defendant with room and board; afterward becoming bankrupt, plaintiff did the work of a house for the defendant. It was held that the nursing services were entirely outside the original contract.

Plaintiff argues that he should have been allowed to file his amendment to his second amended complaint. The amendment suggested was that plaintiff "intended" defendant he expected compensation for his alleged extra services. It should be noted that neither in the original complaint nor in the first amended complaint, was there any allegation that plaintiff had "intended" or "expected" defendant or any expectation of additional compensation. The proposed amendment was already in conflict with the allegations set out in the previous complaint. The court did not abuse his discretion in denying this motion. Boyd v. Boyd, 75 N.Y. 2d, 101, 102, 103.

It was also of the opinion the statute of limitations was a good defense. Plaintiff was employed for an indefinite period of a month against defendant for this of

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the end of each week. The statute of limitations begins to run from the time a cause of action accrues. Zett v. Chasman, 243 Ill. App. 12, and Ennis v. Pullman Palace Car Co., 165 Ill. 161.

All of the alleged extra services by plaintiff, except possibly one item, were rendered more than five years prior to October 30, 1939, the date of the filing of the original complaint, and hence are barred by the five-year statute of limitations.

We have not noted all of the many cases cited by industrious counsel for plaintiff. We have given the affirmative reasons for our conclusion that the orders of the trial court were proper and the motion to dismiss should be sustained.

affirmed.

O'Connor, F.J., and Hatchett, J., concur.

41201

PETER BAIN,

Appellant,

APPEAL FROM

IN TRIAL COURT,

COOK COUNTY.

GUY A. RICHARDSON and WALTER J. CUMMINGS, as Receivers of Chicago Railways Company, a Corporation, and HARVEY E. FLEMING and EDWARD E. BROWN, as Receivers of Chicago City Railway Company, and The Southern Street Railway Company, Corporations, doing business as CHICAGO SURFACE LINES,

Appellees.

307 I.A. 238

MR. JUSTICE McSHURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover damages for injuries received while attempting to board a street car operated by defendants; the verdict was ^{for} defendants and plaintiff appeals.

The accident occurred at the intersections of Division and Halsted streets in Chicago; plaintiff had alighted from a north bound Halsted street car which stopped some distance south of Division street; he walked north on the east side of Halsted and when he reached Division he saw a west bound Division street car approaching 100 to 120 feet east of Halsted; when he reached the south curb of Division the car was 40 feet away; as he came to the east bound street car track the west bound car passed him and came to stop at its regular stopping place at the northeast corner of the two streets, with its rear end opposite plaintiff.

In the complaint it was charged that defendants negligently operated the street car "in that they failed to give the plaintiff an opportunity to safely board the said electric street car."

Plaintiff testified that he went around the rear end of the street car and, while it was standing still, put his left hand on the grab handle at the rear of the platform, his right foot on the step, and as he started to lift his left foot from the ground the car started, causing him to fall; he testified that when he was in this

position on the car the conductor was looking at him, although he did not hear or see the conductor ring the bell.

A witness, Andrew Linke, testified for plaintiff that he could not see over the street car and did not know what happened on the other side of the street car; that when he heard the screech of the wheels the car had stopped and plaintiff was lying in front of the stop sign on the northeast corner.

Clara Werbel testified for defendants that she was on the platform near the entrance door; that when the car started there was nobody on the step or going on the step; that after the car started and had gone some distance someone ran around from the back part of the car and held onto the car but was not standing on the step; that he rolled off in the street; that the signal was immediately given to the motorman and the car stopped.

The motorman did not see plaintiff attempting to board the car. The conductor testified he was standing on the rear platform; that when the car reached Halsted it came to a stop on the east side of Halsted where a lady and a man got on; he gave the signal to proceed; after the car had gone about a car length he saw plaintiff grab hold of the rear grab rail on the rear of the car and try to swing himself over to the step, but he let go and fell over on his hands and knees; he came over from around the back of the car; he was not there at the time the street car started; at the time plaintiff attempted to take hold of the car it was going about 10 miles an hour.

Walter Ward was a passenger sitting on the long seat at the rear of the car, facing north. He testified that when the car reached the east side of Halsted it stopped and two passengers got on - a lady and a man; then the car started; that when the rear end of the street car was about at the east crossing of Halsted, he heard the emergency bell and saw a hand or hands trying to grab hold of the center bar of the platform.

The greater weight of the evidence tends to disprove any negligence on the part of defendants. On the contrary, it shows

position on the car the conductor was looking at him, although he did not hear or see the conductor ring the bell.

A witness, Andrew Lister, testified for plaintiff that he could not see over the street car and did not know what happened on the other side of the street car; that when he heard the conductor of the street car say "stop" and plaintiff was riding in front of him stop sign on the northeast corner.

Glenn testified for defendant that she was on the platform near the entrance door; that when the car started there was nobody on the step or going on the step; that after the car started and had gone some distance someone ran across from the back part of the car and held onto the car but was not standing on the step; that he yelled off in the street; that the signal was immediately given to the motorman and the car stopped.

The motorman did not see plaintiff attempting to board the car. The conductor testified he was standing on the rear platform; that when the car reached plaintiff it came to a stop on the east side of plaintiff where a lady and a man got on; he gave the signal to proceed; after the car had gone about a car length he saw plaintiff grab hold of the rear grab rail on the rear of the car and try to swing himself over to the step, but he did so and fell over on his hands and knees; he came over from around the back of the car; he was not there at the time the street car started; at the time plaintiff attempted to take hold of the car it was going about 10 miles an hour.

Neither lady nor a passenger sitting on the bench seat on the rear of the car, facing north. He testified that when the car reached the east side of plaintiff it stopped and two passengers got on - a lady and a man; then the car started; that when the rear end of the street car was about at the east entrance of plaintiff, he heard the emergency bell and saw a hand or hands trying to grab hold of the center bar of the platform.

The greater weight of the evidence tends to disprove any negligence on the part of defendant. On the contrary, it shows

clearly that plaintiff undertook to board the street car after it was in motion.

The appealing plaintiff does not argue that the verdict is contrary to the weight of the evidence but his brief is confined exclusively to criticisms of instructions given on behalf of defendants. It was said to be erroneous and prejudicial to receive 80 instructions given at the request of defendants as against 9 given at the request of plaintiff. We do not approve the giving of a large number of instructions, especially in a case like the present one where the issues were simple. However, it has been held in a number of cases that although a needless number of instructions are given, that fact alone will not be ground for reversal if the instructions are correct.

Carson, Pirie, Scott & Co. v. Chicago Ry. Co., 309 Ill. 846, 382; Daubach v. Drake Hotel Co., 243 Ill. App. 298, 308 and Chicago City Ry. Co. v. Sandusky, 198 Ill. 400, where the ruling of the trial court restricting the number of instructions was held to be error, the court saying any rule which would authorize the refusal of an instruction otherwise proper to be given, on the ground alone that as many instructions as the rule allowed had been given, could not be defended.

With much skill the brief for plaintiff criticizes most of the instructions given at the request of defendants and defendants' brief attempts to answer. To attempt to analyze and determine all the points made in this respect would be merely an exercise in logomachy.

Most of the points made have been made in similar personal injury cases and we do not find that any of them, standing alone, constitute reversible error, except, possibly, instruction No. 13, which in effect told the jury there was a city ordinance making it unlawful for any person to board or alight from a street car while it was in motion, and that if the jury believe plaintiff was doing this he can not recover. The mere fact that plaintiff was violating an ordinance at the time he was injured will not bar his right to recover unless the unlawful act proximately contributed to the accident. Russell v.

Richardson, 302 Ill. App. 329, 296 and Laratta v. Director General, 306 Ill. 343, and many other cases. On the other hand, it has been held that violation of an ordinance designed to promote safety is negligence per se. Flynn v. Chicago City Ry. Co., 250 Ill. 460, 480. Here the evidence showed that plaintiff attempted to board the car after it was in motion, which caused the accident. This being true, there was no negligence on the part of defendants and hence plaintiff could not recover, regardless of the existence of any ordinance. Under these circumstances, giving of the instruction will not necessitate a reversal.

The verdict is supported by the greater weight of the evidence and was not produced by any irregularities or errors in the instructions given, but solely upon the facts as developed by the witnesses.

The judgment is affirmed.

JUDGMENT AFFIRMED.

O'Connor, P.J., and Matchett, J., concur.

41813

MARY F. NOWIE, et al.,

v.

VILLAGE OF MOUNT PROSPECT, et al.

VILLAGE OF MOUNT PROSPECT, a
Municipal Corporation,

Appellant,

v.

CHRISTIAN D. BUSEE, et al.,

Appellees.)

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

307 I.A. 238²

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

The Village of Mount Prospect appeals from an order striking its cross-complaint which it had filed in a suit brought by Mary F. Nowie for an accounting of moneys alleged to have been collected on certain special assessments.

Her complaint asked that an accounting be made as to the special assessments and the issuance of special assessment bonds. It alleged that beginning with 1927 and annually thereafter the Village of Mount Prospect collected a large sum of money in special assessments which it was its duty to segregate and use in payment of certain bonds at maturity. An answer was filed denying in general the allegations of the complaint.

Thereafter, the Village of Mount Prospect filed its cross-complaint making Christian D. Busee, village treasurer, and eight other persons alleged to be sureties on his bond, parties to its cross-complaint. It was charged that Busee, as village treasurer during the years that the special assessments were in collection, had misapplied these collections and that the sureties on his bond were liable and therefore had an interest in the final determination of the proceeding. The parties named as cross-defendants moved to dismiss this cross-complaint or in the alternative to make the allegations more definite and certain. The motion to dismiss was allowed. No request to amend

307 I.A. 288

THE JUDICIAL DEPARTMENT, NEW YORK

The Village of Mount Prospect is a village in the County of Cook, State of New York. It is a village which is not a city, town or village. It is a village which is not a city, town or village. It is a village which is not a city, town or village.

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was made and the cross-complainant appeals to this court.

The opposing counsel properly say the burden is on the cross-complainant to show in this court that the order appealed from was erroneous. The brief of cross-complainant makes no such showing. Cross-complainant in this court admits that the complaint "is not as complete or as perfect as it could be," and asks this court to give leave to amend the cross-complaint. No suggestion is presented as to the character of the amendment proposed.

While section 24 of the Practice act provides that defendants who are interested in any controversy may be made parties defendant so as to determine any liability, yet we do not think this authorizes the practice of bringing in sureties over a period of years, commencing in this case with 1927, thus cumbering the record.

Moreover, the motion to strike the cross-complaint asserted, among other things, that the cross-complaint was multifarious as joining distinct and separate causes of action; that it did not comply with section 35 of the Practice act, which requires every counterclaim to be pleaded with the same particularity as a complaint and complete in itself. Section 33 requires that each counterclaim must be separately pleaded, and section 36 requires that whenever the counterclaim is founded upon a written instrument, a copy thereof must be attached to the pleadings unless the pleader shall make an affidavit stating facts that such instrument is not accessible to him. The cross-complaint does not contain a plain and concise statement of the pleader's complaint but merely makes the general allegation that an accounting will determine the liability of each of the sureties. In many other respects the cross-complaint was insufficient and the motion to strike was proper and it is affirmed.

AFFIRMED.

O'Connor, P.J., and Hatchett, J., concur.

has made and the cross-complainant appears to this court.

The opposing counsel properly say the burden is on the complainant to show in this court that the order appealed from was erroneous. The brief of cross-complainant makes no such statement. Cross-complainant in this court admits that the complaint "is not as complete as it should be," and asks this court to give leave to amend the cross-complaint. No objection is presented as to the character of the amendment proposed.

While section 36 of the Practice Act provides that persons who are interested in any controversy may be made parties before and as to determine any liability, yet so do not think this authorizes the practice of joining in parties who are not parties to the controversy in this case with 1937, thus changing the record.

Moreover, the action to strike the cross-complaint is barred, among other things, that the cross-complaint was withdrawn as joining distinct and separate causes of action; that it did not comply with section 36 of the Practice Act, which requires every complaint to be pleaded with the same particularity as a complaint and comply in itself. Section 36 requires that each cause of action must be separately pleaded, and section 36 requires that whenever the counterclaim is founded upon a written instrument, a copy thereof must be attached to the pleading unless the pleader shall make an affidavit stating that such instrument is not accessible to him. The cross-complaint does not contain a plain and concise statement of the pleader's complaint but merely makes the general allegation that an accounting will determine the liability of each of the parties. In many other respects the cross-complaint was insufficient and the action to strike was proper and it is affirmed.

O'Donnell, J., and Patterson, J., concur.

ELIZABETH SONDBERG, Successor
Trustee to Charles A. Koepke,
deceased, FRED A. MARSHALL,
and GEORGE W. STEWART,

Appellees,

v.

CLARENCE D. MATTESON, LOUIS W.
MACK, LOUIS H. MACK and CATHERINE
MACK,

Appellants.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

307 I.A. 239

MR. JUSTICE McBRIDE DELIVERED THE OPINION OF THE COURT.

Defendants appeal from a foreclosure decree and orders of court denying motions to vacate the decree; the record purports to show that the decree was entered by stipulation of the parties. Defendants attack the decree in this court, arguing that a consent decree is not strictly a judicial decree; that a decree by consent without any evidence is always error; that no proof was taken and the stipulation upon which the decree was entered must appear fully in the decree itself.

Plaintiffs filed a complaint to foreclose a mortgage made by Clarence D. Matteson to secure his five promissory notes of \$4000 each; answers of the various defendants were filed; there was apparently discussion between the parties and June 22, 1939, they appeared before Judge Fisher of the Circuit court, where in an extended colloquy between the court and counsel representing all of the parties, the court dictated in substance the following: That it was stipulated between the parties that the court should enter a decree of sale in both cases [the other case is Mullins, et al v. Sedman, et al., No. 41225, Opinion filed this day] some time in October, but if before the sale the parties should settle their differences the court would modify the decree in any form that the parties might stipulate; that if, before October 1, defendant Mack should deposit in Mullins v. Sedman, \$4000 and in the present case a deed to the property involved, and should plaintiffs refuse to accept this, a motion to vacate the decree would be allowed as a matter of course, the parties then

8071.A.339

...the court having written to vacate the decree; the record herein to show that the decree was entered by stipulation of the parties. The ... is not strictly a judicial decree; that a decree by consent is not ... any evidence is always error; that no proof was taken and the ... action upon which the decree was entered must appear fully in the ... itself.

... Plaintiff filed a complaint to foreclose a mortgage made by ... to secure his five promissory notes of \$4000 ... at the various telephone calls which ... Plaintiff ... the parties and that ... they ... the ... of the ... court, there is no ... between the court and counsel representing all of the parties ... the court dictated in substance the following: That it was ... that the parties that the court should enter a decree of ... sale in both cases [the other case is William E. v. No. 4132, dated this day] now then in ... before the sale the parties should settle their differences the court would modify the decree in any form that the parties might stipulate; that it, before ... I, defendant ... should deposit in William v. ... and in the present case a deed to the property involved, and should Plaintiff refuse to accept this, a motion to vacate the ... be allowed as a matter of course, the parties then

standing before the court in the same position as they then stood, with the right to have a full and complete hearing but should Mr. Mack fail to make the deposit of \$4000 and the deed, the motion to vacate the decree will be overruled and the decree will follow in the ordinary and usual way.

Mr. Zimmerman, acting for plaintiffs, stated that this was agreeable to his clients. Mr. Mack, who was acting for the defendants and himself, was asked whether the parties present had all of the authority necessary "to enter into the stipulation to be binding on all parties in interest," to which Mr. Mack replied, "Absolutely." The parties also agreed as to the length of time for the proposed settlement and, to the question whether October 1 should be the limit, Mr. Mack replied in the affirmative. Mr. Sternberg, whom the record describes as attorney for defendants, also acquiesced in this agreement. The court suggested that written copies of the agreement be given to each of the parties and the attorneys expressed the opinion that it would not be necessary to have the respective signatures of the parties to the agreement.

Pursuant to this stipulation a decree was filed June 24, which recites it was entered "pursuant to a certain stipulation" between the parties, all of whom appeared in open court by their respective attorneys, defendant Mack appearing pro se. The decree also recites that the court was "acting pursuant to the stipulation entered into between all parties, after due notice to all parties entitled thereto, including all of the parties to the action and their attorneys heretofore specified herein." Defendants made motions to vacate the decree, which the stipulation indicates were to be made so that the court would retain jurisdiction.

The necessary funds and the deed which the stipulation provided should be deposited by October 1, 1939, were not deposited and additional time for this purpose was granted. December 15, 1939, the court entered an order overruling the motions of defendants to vacate the decree. This order refers to the stipulation entered into

standing before the court in the same position as they then stood, with the right to have a trial and complete hearing but should not fail to make the deposit of \$4000 and the deed, the motion to vacate the decree will be overruled and the decree will follow in the ordinary and usual way.

Mr. Zimmerman, acting for plaintiff, stated that this was agreeable to his client. Mr. Mack, who was acting for the defendant and himself, was asked whether the parties consented that all of the authority necessary "to enter into the stipulation to be binding on all parties in interest," so which Mr. Mack replied, "absolutely." The parties also agreed as to the length of time for the process, settlement and, to the question whether before I should be the limit, Mr. Mack replied in the affirmative. Mr. Zimmerman, when the record examined as attorney for defendant, also expressed in this agreement. The court suggested that written copies of the agreement be given to each of the parties and the attorneys expressed the opinion that it would not be necessary to have the respective signatures of the parties to the agreement.

Consent to this stipulation a copy was filed with the court which recited it was entered "pursuant to a certain stipulation" between the parties, all of whom appeared in open court by their respective attorneys, defendant each appearing pro se. The decree also recited that the court was "sitting pursuant to the stipulation entered into between all parties, after due notice to all parties entitled thereto, including all of the parties to the action and their attorneys, defendant each appearing pro se." The court then made no such stipulation, which the stipulation indicated were to be made so that the court would retain jurisdiction.

The necessary funds and the deed which the stipulation provided should be deposited by October 1, 1930, were not deposited and sufficient time for this purpose was granted. November 15, 1930. The court entered an order overruling the motion of defendant to vacate the decree. This order refers to the stipulation entered into

in open court on June 22, 1939, by all parties to this cause by their respective duly authorized counsel, including defendant Mack. The order referred to and recited the main provisions of the stipulation.

January 12, 1940, defendants made another motion to vacate the decree, Mr. Mack then stating for the first time that if he had understood the clear legal effect of the stipulation he would not have been a party to it. The court ruled that the parties were held by the terms of the stipulation and denied the motion.

In Bergman v. Rhodes, 334 Ill. 137, 143, it was sought to set aside a decree which the record showed was entered by agreement of the parties. The court held that a decree so entered by consent can not be reviewed by appeal or writ of error, citing Paine v. Doughty, 251 Ill. 396, and Galway v. Galway, 231 Ill. 217. It can only be set aside by an original bill in the nature of a bill of review. Mohensadel v. Steele, 237 Ill. 229, and Hungarian Benevolent Society v. Aid Society, 283 Ill. 99.

It is not necessary that the decree recite the stipulation. If the stipulation appears in the record no recitals in the decree are necessary. Grov v. Harrison, 248 Ill. 462, 466. In Rahuler v. Hogan, 168 Ill. 369, 393, it was held where a decree recites that it is by consent it will be presumed that it is upon sufficient evidence. Moreover no special findings are now required. (§64 Practice act, ch. 110, Ill. Rev. Stats. 1939.)

Cases cited by defendants are not controlling. Patterson v. Northern Trust Co., 238 Ill. 601, merely holds that a decree must show it is a consent decree but it does not hold that the stipulation must be incorporated in the decree. Krieger v. Krieger, 221 Ill. 479, holds that a decree not showing any consent can be shown by other evidence to be pursuant to a stipulation.

Defendants say a consent decree is nothing but a contract and therefore governed by the law of contracts, but the case they cite in support says, "A consent decree partakes of the nature of

in some cases on June 22, 1967, by all parties to this case by their
respective duly authorized counsel, including defendant, the
understanding to and waived the main provisions of the stipulation.
Accordingly, the court ruled that the parties were held to
the terms of the stipulation and denied the motion.
In Bartholomew v. Bartholomew, 302 Ill. 127, 128, it was held to
not make a decree which the record showed was entered by agreement of
the parties. The court held that a decree so entered by consent and
not be reviewed by appeal or writ of error, citing Bartholomew v. Bartholomew,
302 Ill. 127, 128, and Bartholomew v. Bartholomew, 302 Ill. 127. It was only by an
order by an original bill in the nature of a bill of review, Bartholomew
v. Bartholomew, 302 Ill. 127, 128, and Bartholomew v. Bartholomew, 302 Ill. 127.

It is not necessary that the decree recite the stipulation.
If the stipulation appears in the record no recital is required.
See Bartholomew v. Bartholomew, 302 Ill. 127, 128, and Bartholomew v. Bartholomew,
302 Ill. 127, 128. It was held where a decree recites that it
is by consent it will be presumed that it is upon sufficient evidence.
However, no special findings are required. (See Bartholomew v. Bartholomew,
302 Ill. 127, 128.)

Cases cited by defendant are not controlling. Bartholomew
v. Bartholomew, 302 Ill. 127, 128, merely holds that a decree which
shows it is a consent decree has it does not hold that the stipulation
must be incorporated in the decree. Bartholomew v. Bartholomew, 302 Ill. 127.
Holds that a decree not showing any consent can be shown by other
evidence to be pursuant to a stipulation.
Defendants say a consent decree is nothing but a contract

and therefore governed by the law of contracts, but the law that
also in support says, "a consent decree operates of the nature of

both a contract and a decree." American Tar Products Co. v. Bradner Smith & Co., 238 Ill. App. 151, 158.

Other suggestions made by defendants are without merit. The decree and the orders of the trial court are affirmed.

AFFIRMED.

O'Connor, P.J., and Matchett, J., concur.

WILLIAM A. HARRIS, JR., and JAMES H. HARRIS, JR., Defendants.

THE STATE OF TEXAS, County of DALLAS.

That the undersigned, being duly sworn, depose and say that the above-named defendants are guilty of the crime of

murder.

Witness my hand and seal this 1st day of January, 1911.

41225

R. I. DAVIS, succeeded by LOGAN
L. MULLINS, Receiver, CHARLES A.
KOEPKA, Trustee, succeeded by
LEROY A. GARR, as Successor
Trustee, et al.,

Appellees,

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

v.
CHARLES WEDMAN and LOUIS W. MACK,
Appellants.

307 1.A. 240

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendants by this appeal seek the reversal of a decree and various orders entered in a foreclosure proceeding; the complaint to foreclose was filed January 8, 1927, by R. I. Davis alleging that Charles Wedman, one of the defendants, was indebted in the principal sum of \$20,000 and executed four notes for \$5000 each secured by a trust deed conveying real estate as security; that plaintiff was the legal holder of one of the promissory notes on which there was then due \$1000 with interest. Answers were filed by defendants.

Subsequently Logan L. Mullins, as receiver of Humboldt Bond and Mortgage Company, was substituted for R. I. Davis; also, an affidavit was filed stating that Charles A. Koepke, the trustee in the trust deed had died October 6, 1931, and Leroy A. Garr as successor trustee was substituted in his stead. The decree sought to be reversed was entered December 15, 1930, nearly thirteen years after the complaint was filed.

In the meantime various phases of the litigation have been before the courts. Davis v. Wedman, 236 Ill. App. (abst.) 607, certiorari denied by the Supreme court; Chicago Title & Trust Co. v. Mack, 262 Ill. App. (abst.) 632, affirmed by the Supreme court in 347 Ill. 480.

The cause was referred to a master in chancery who took evidence and filed his report. From this point the case is in most respects a companion case to Sundberg, et al. v. Matteson, et al., No. 41224, in which an opinion has been filed by us this day. What we have said in that case is applicable to the instant case.

1. The following information was obtained from the records of the Department of the Interior, Bureau of Land Management, regarding the land owned by the United States in the State of Nevada:

042.4.1708

1944-1945

The above information was obtained from a review of the records of the Federal Bureau of Investigation, and is being furnished to you for your information.

The complaint was filed.
The trustee was substituted in his stead. The design seemed to me
the trust had also October 8, 1931, and later A. With no reason-
attested and filed stating that William F. Smith, the trustee at
and George Thompson, was substituted for A. I. Davis; also, in

III. 197.

The same was referred to a master in January and was
evidence and filed his report. From this point the case is in most
probably a companion case to United States v. [redacted], et al.,
No. 1128, in which an opinion has been filed by the Chief Justice.
We have said in that case is applicable to the instant case.

June 15, 1939, the case came on for argument on the master's report, which was favorable to plaintiffs, and objections. The court indicated that he would overrule all the objections and exceptions.

June 22, 1939, the following occurred, as in the Sundberg case referred to. The court stated that it is stipulated between the parties herein as follows: "That the court enter decrees of sale in both cases" (referring to Mullins, et al. v. Hedman, et al. and Sundberg, et al. v. Matteson, et al.), setting the date of sale sometime after the reopening of court in the September term. It was then suggested to make the date October 1, which was agreed to. The court also stated that a motion to vacate should be entered in each case and that if before the date of sale the parties should settle their differences the court would modify the decree as the parties might stipulate. It was also agreed that should the plaintiffs refuse to accept a deposit of \$4000 by Mr. Mack before October 1, and a deed to the property involved in the Sundberg case in full settlement of the indebtedness involved in the two cases, the motions to vacate would be allowed. Should Mr. Mack fail to make this deposit and deed, the motion to vacate the decrees will be overruled. In answer to an inquiry by plaintiffs' attorney as to whether there was present all the authority necessary to enter into the stipulation so as to be binding on all parties in both cases, Mr. Mack replied "Absolutely." This was also acquiesced in by Mr. Sternberg, described as attorney for defendants.

The decree, which was entered June 23, 1939, recites that it was entered pursuant to the stipulation between the parties in the instant case, naming them, "all of whom have appeared in open court by their respective attorneys," and Louis W. Mack, who appeared pro se; that after hearing arguments on the objections to the master's report the court overruled the same and approved the report. The rest of the decree is in the usual form.

Mr. Mack failed to make the deposits with the court as provided for in the stipulation, and December 18, 1939, the court en-

June 12, 1933, the case was on for argument on the motion's report, which was favorable to plaintiff, and objection. The court indicated that he would overrule all the objections and exceptions.

June 12, 1933, the following occurred, as in the minutes case referred to. The court stated that it is stipulated between the parties herein as follows: "That the court enter decree of sale in both cases" (referring to William, et al. v. Federal, et al. and

William, et al. v. Federal, et al., wherein the sale of said mortgaged

after the reopening of court in the summer term. It was then suggested to make the date October 1, which was agreed to. The court also stated that a motion to vacate should be entered in each case and that it before the date of sale the parties should settle their differences.

Thereafter the court would modify the decree as the parties might stipulate. It was also agreed that should the plaintiff refuse to accept a deposit of \$1000 by Mr. Frank before October 1, and a bond on the property involved in the Frank case in full satisfaction of the indebtedness involved in the two cases, the motion to vacate would be

allowed. Should Mr. Frank fail to make this deposit and bond, the motion to vacate the decree will be overruled. In answer to an inquiry by plaintiff's attorney as to whether there was present all the authority necessary to enter into the stipulation as to the making

on all parties in both cases, Mr. Frank replied "Certainly". This was also acknowledged in by Mr. Frank, described as attorney for defendant.

The decree, which was entered June 22, 1933, recited that it was entered pursuant to the stipulation between the parties in the instant case, reading that "all of said debt payable in cash must be paid before October 1, 1933, and said V. Bond, who executed said bond, shall enter binding agreement as the stipulation to the motion's report. The court overruled the same and approved the report. The rest of the

decree is in the usual form. Mr. Frank failed to make the deposit with the court as provided for in the stipulation, and therefore the decree was

tered an order overruling defendants' motions to vacate the decree and in the order recited that "the foregoing recital of events from and including June 22, 1932, to and including the date of this order is true and correct and is hereby adopted as the findings of this court." The order further recites that the denial of the motion to vacate "was pursuant to the aforesaid stipulation." It is established beyond dispute that the decree of foreclosure entered June 23, 1935, was entered with the consent of all the defendants.

Defendants question the right of Miss R. I. Davis to commence the foreclosure, but she testified that she held the note, No. 3, for the benefit of Humboldt State Bank. The execution of the note and mortgage and the default were admitted by defendant Pedman. The trust deed authorized the institution of the foreclosure suit by the legal holder of the note, and Charles A. Keepke trustee, joined as co-plaintiff. Kazunas v. Wright, 286 Ill. App. 554, 559.

The brief of defendants contains a lengthy statement of certain transactions involving the Louisville Fuel Co., the Keystone Trust & Savings Bank and other parties. None of these transactions is germane to the sole decisive question presented, namely, was the decree entered pursuant to a binding stipulation of the parties? The record clearly shows that this was so. In Lundberg, et al. v. Matteson, et al., No. 41224, in an opinion filed this day, we have held that this stipulation was binding and the decree entered was valid.

Where a decree recites that it is entered pursuant to a stipulation it will be presumed that such consent was given. Schuler v. Hogan, 188 Ill. 369, 383. It has been held that a decree entered by consent cannot be reviewed by appeal or writ of error. Bergman v. Rhodes, 334 Ill. 137, 143. It is not necessary that the decree recite the stipulation if it appears in the record. Crow v. Harrison, 240 Ill. 462, 466.

We have repeatedly said, quoting from Stoll v. Gottlieb, 305 U.S. 165, 172, "It is just as important that there should be a place

...an order overruling defendant's motion to vacate the judgment and
in the order recited that "the foregoing recital of events that led
including June 22, 1937, to and including the date of this order is
true and correct and is hereby adopted as the finding of this court."
The order further recites that the finding of the court is vacated "upon
payment to the estate of defendant." It is established beyond
dispute that the estate of defendant received from June 22, 1937, and
entered with the consent of all the defendants.

Defendant questions the right of the estate of A. I. Davis to recover
the proceeds, but she stipulated that she said the note, No. 2, for
the benefit of husband's estate. The execution of the note and
proceeds and the details were admitted by defendant's counsel. The court
and authorized the inclusion of the proceeds into the legal
holder of the note, and entered a decree finding, among other things,

Kazunas v. Wright, 286 Ill. App. 254, 259.

The trial of defendant contains a lengthy statement of
certain transactions involving the defendant's husband, and defendant
trust a certain bank and other parties. None of these transactions
is germane to the sole decisive question presented, namely, was the
decree entered pursuant to a binding stipulation of the parties? The
record clearly shows that this was so. In Langbehn v. A. I. Davis,
286 Ill. App. 254, it is stated that the decree entered was
valid.

Where a decree recites that it is entered pursuant to a
stipulation it will be presumed that such consent was given. Johnson
v. Johnson, 123 Ill. 300, 304. It has been held that a decree entered
by consent cannot be reviewed by appeal or writ of error. Johnson v.
Johnson, 236 Ill. 137, 140. It is not necessary that the decree recite
the stipulation if it appears in the record. Gray v. Harrison, 123
Ill. 483, 486.
We have repeatedly said, quoting from Boyle v. Boyle, 203
Ill. 248, 257, "It is just as important that there should be a place

to end as that there should be a place to begin litigation."

For the reasons above stated and also stated in Sundberg, et al. v. Matteson, et al., No. 41224, the decree and orders appealed from are affirmed.

AFFIRMED.

O'Connor, P.J., and Matchett, J., concur.

*Continued from page 10

Top the lettuce with sliced red onion and onion.

Referred to the Committee on Education and the Labor Committee, and to the Committee on the Judiciary, for their consideration.

1947-1948 1949-1950

1900-1901, 1902-1903, 1904-1905, 1906-1907, 1908-1909, 1910-1911, 1912-1913, 1914-1915, 1916-1917, 1918-1919, 1920-1921, 1922-1923, 1924-1925, 1926-1927, 1928-1929, 1930-1931, 1932-1933, 1934-1935, 1936-1937, 1938-1939, 1940-1941, 1942-1943, 1944-1945, 1946-1947, 1948-1949, 1950-1951, 1952-1953, 1954-1955, 1956-1957, 1958-1959, 1960-1961, 1962-1963, 1964-1965, 1966-1967, 1968-1969, 1970-1971, 1972-1973, 1974-1975, 1976-1977, 1978-1979, 1980-1981, 1982-1983, 1984-1985, 1986-1987, 1988-1989, 1990-1991, 1992-1993, 1994-1995, 1996-1997, 1998-1999, 2000-2001, 2002-2003, 2004-2005, 2006-2007, 2008-2009, 2010-2011, 2012-2013, 2014-2015, 2016-2017, 2018-2019, 2020-2021, 2022-2023, 2024-2025, 2026-2027, 2028-2029, 2030-2031, 2032-2033, 2034-2035, 2036-2037, 2038-2039, 2040-2041, 2042-2043, 2044-2045, 2046-2047, 2048-2049, 2050-2051, 2052-2053, 2054-2055, 2056-2057, 2058-2059, 2060-2061, 2062-2063, 2064-2065, 2066-2067, 2068-2069, 2070-2071, 2072-2073, 2074-2075, 2076-2077, 2078-2079, 2080-2081, 2082-2083, 2084-2085, 2086-2087, 2088-2089, 2090-2091, 2092-2093, 2094-2095, 2096-2097, 2098-2099, 2100-2101, 2102-2103, 2104-2105, 2106-2107, 2108-2109, 2110-2111, 2112-2113, 2114-2115, 2116-2117, 2118-2119, 2120-2121, 2122-2123, 2124-2125, 2126-2127, 2128-2129, 2130-2131, 2132-2133, 2134-2135, 2136-2137, 2138-2139, 2140-2141, 2142-2143, 2144-2145, 2146-2147, 2148-2149, 2150-2151, 2152-2153, 2154-2155, 2156-2157, 2158-2159, 2160-2161, 2162-2163, 2164-2165, 2166-2167, 2168-2169, 2170-2171, 2172-2173, 2174-2175, 2176-2177, 2178-2179, 2180-2181, 2182-2183, 2184-2185, 2186-2187, 2188-2189, 2190-2191, 2192-2193, 2194-2195, 2196-2197, 2198-2199, 2200-2201, 2202-2203, 2204-2205, 2206-2207, 2208-2209, 2210-2211, 2212-2213, 2214-2215, 2216-2217, 2218-2219, 2220-2221, 2222-2223, 2224-2225, 2226-2227, 2228-2229, 2230-2231, 2232-2233, 2234-2235, 2236-2237, 2238-2239, 2240-2241, 2242-2243, 2244-2245, 2246-2247, 2248-2249, 2250-2251, 2252-2253, 2254-2255, 2256-2257, 2258-2259, 2260-2261, 2262-2263, 2264-2265, 2266-2267, 2268-2269, 2270-2271, 2272-2273, 2274-2275, 2276-2277, 2278-2279, 2280-2281, 2282-2283, 2284-2285, 2286-2287, 2288-2289, 2290-2291, 2292-2293, 2294-2295, 2296-2297, 2298-2299, 2300-2301, 2302-2303, 2304-2305, 2306-2307, 2308-2309, 2310-2311, 2312-2313, 2314-2315, 2316-2317, 2318-2319, 2320-2321, 2322-2323, 2324-2325, 2326-2327, 2328-2329, 2330-2331, 2332-2333, 2334-2335, 2336-2337, 2338-2339, 2340-2341, 2342-2343, 2344-2345, 2346-2347, 2348-2349, 2350-2351, 2352-2353, 2354-2355, 2356-2357, 2358-2359, 2360-2361, 2362-2363, 2364-2365, 2366-2367, 2368-2369, 2370-2371, 2372-2373, 2374-2375, 2376-2377, 2378-2379, 2380-2381, 2382-2383, 2384-2385, 2386-2387, 2388-2389, 2390-2391, 2392-2393, 2394-2395, 2396-2397, 2398-2399, 2400-2401, 2402-2403, 2404-2405, 2406-2407, 2408-2409, 2410-2411, 2412-2413, 2414-2415, 2416-2417, 2418-2419, 2420-2421, 2422-2423, 2424-2425, 2426-2427, 2428-2429, 2430-2431, 2432-2433, 2434-2435, 2436-2437, 2438-2439, 2440-2441, 2442-2443, 2444-2445, 2446-2447, 2448-2449, 2450-2451, 2452-2453, 2454-2455, 2456-2457, 2458-2459, 2460-2461, 2462-2463, 2464-2465, 2466-2467, 2468-2469, 2470-2471, 2472-2473, 2474-2475, 2476-2477, 2478-2479, 2480-2481, 2482-2483, 2484-2485, 2486-2487, 2488-2489, 2490-2491, 2492-2493, 2494-2495, 2496-2497, 2498-2499, 2500-2501, 2502-2503, 2504-2505, 2506-2507, 2508-2509, 2510-2511, 2512-2513, 2514-2515, 2516-2517, 2518-2519, 2520-2521, 2522-2523, 2524-2525, 2526-2527, 2528-2529, 2530-2531, 2532-2533, 2534-2535, 2536-2537, 2538-2539, 2540-2541, 2542-2543, 2544-2545, 2546-2547, 2548-2549, 2550-2551, 2552-2553, 2554-2555, 2556-2557, 2558-2559, 2560-2561, 2562-2563, 2564-2565, 2566-2567, 2568-2569, 2570-2571, 2572-2573, 2574-2575, 2576-2577, 2578-2579, 2580-2581, 2582-2583, 2584-2585, 2586-2587, 2588-2589, 2590-2591, 2592-2593, 2594-2595, 2596-2597, 2598-2599, 2600-2601, 2602-2603, 2604-2605, 2606-2607, 2608-2609, 2610-2611, 2612-2613, 2614-2615, 2616-2617, 2618-2619, 2620-2621, 2622-2623, 2624-2625, 2626-2627, 2628-2629, 2630-2631, 2632-2633, 2634-2635, 2636-2637, 2638-2639, 2640-2641, 2642-2643, 26

41177

WALTER E. HELLER & COMPANY,
a Corporation,

Appellee,

APPEAL FROM

v.

MUNICIPAL COURT,

JOHANNA MARTIN,

Appellant.

OF CHICAGO.

307 N.A. 240²

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This suit was begun August 13, 1937, by a confession of judgment which plaintiff caused to be set aside on its own motion on October 6. Thereafter plaintiff filed an amended statement of claim and defendant an affidavit of merits with demand for jury, tendering the fee, and the cause was placed on the jury calendar.

September 19, 1939, the case came on for trial in the absence of defendant and her attorney. Judgment for 1391.30 was entered on the finding of the court. September 22, defendant moved to vacate the judgment. The motion was supported by an affidavit of attorney for defendant, showing that he was misled as to the time the case was to be tried and also facts which it is claimed showed a defense upon the merits. When the motion came up for hearing on November 13, 1939, the parties entered into a verbal stipulation that the hearing should be "solely upon the pleadings and exhibits, for an adjudication upon the validity and sufficiency of plaintiff's claim as set forth in said Amended Statement of Claim and upon the validity and sufficiency of defendant's defense as set forth in her said Defense, said affidavit and exhibits, in the same manner and to every extent and purpose as if no judgment had been obtained ex parte as aforesaid."

The pleadings were submitted to the court with exhibits consisting of Exhibit 1, a contract of conditional sale to which the note at the time of execution had been attached; Exhibit 2, a proposal and guaranty for sale of a stoker which was the consideration of the note; and Exhibit 3, a copy of schedule of receivables showing the assignment of the note and account to plaintiff. Upon considering

307 I.A. 240

This suit was begun August 15, 1937, by a declaration of judgment which plaintiff caused to be set aside on the same motion on October 8. Thereafter plaintiff filed an amended statement of claim and defendant an affidavit of merits with reasons for jury, pending the fee, and the cause was placed on the jury calendar.

September 12, 1937, the case came on for trial in the absence of defendant and her attorney. Judgment for \$100.00 was entered on the finding of the court. September 22, defendant moved to vacate the judgment. The motion was supported by an affidavit of attorney for defendant, showing that he was misled as to the date the case was to be tried and also facts which it is claimed showed a defense upon the merits. When the motion came up for hearing on November 12, 1937, the parties entered into a verbal stipulation that the hearing should be "solely upon the pleadings and exhibits, for an adjudication upon the validity and sufficiency of plaintiff's claim as set forth in said amended statement of claim and upon the validity and sufficiency of defendant's defense as set forth in her said defense, said affidavits and exhibits, in the same manner and to every extent and purpose as if no judgment had been obtained or entry as

stipulated. The pleadings were submitted to the court with exhibits consisting of Exhibit 1, a contract of conditional sale on which the note as the line of execution had been attached; Exhibit 2, a promissory note and guaranty for sale of a stocker which was the consideration of the note; and Exhibit 3, a copy of schedule of receivables showing the settlement of the note and account to plaintiff. Upon considering

the pleadings and these exhibits, the court found that the promissory note detached from the conditional sales contract was a negotiable instrument; that the conditions of the conditional sales contract and proposal and guaranty of which the promissory note was a part did not affect the negotiability of the note, which in the hands of a third party was not subject to any defense arising from the contract, nor from the proposal and guaranty; that Exhibit 3 (the schedule of receivables under which plaintiff received and held the promissory note) did not affect the negotiability of the note nor the position of plaintiff as a holder for value without notice; that defendant was without recourse as against plaintiff and the rights for plaintiff for recovery upon the note absolute. The court, therefore, found as a matter of law that the defense interposed to the statement of claim was insufficient in law and sustained the judgment for \$391.30 previously entered. From this judgment defendant appeals.

The matter was submitted upon the pleadings and the exhibits. The court found, as a matter of law, that the defense was insufficient and sustained the judgment as entered. The pleadings of the defendant (and they were verified) all asserted that plaintiff, as a matter of fact, had notice of the defenses to the note. The pleadings of defendant show that the consideration for the execution of the note was a stoker, and that it was entirely worthless. Assuming these things to be true and that plaintiff purchased with knowledge, plaintiff was not entitled to recover as a matter of law. If plaintiff took the note with notice as defendant alleged, he was not a holder in due course. Section 52, ch. 98, Ill. Rev. Stats. 1939.

For the error in holding as a matter of law under the pleadings and exhibits that defendant was liable, the judgment will be reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

O'Connor, P.J., and McSurely, J., concur.

The plaintiff and the defendant, the court found that the plaintiff
 note obtained from the conditional sales contract was a negotiable
 instrument; that the condition of the conditional sales contract and
 proposal and guaranty of which the plaintiff was a party did not
 affect the negotiability of the note, which in the hands of a third
 party was not subject to any defense arising from the contract, nor
 from the proposal and guaranty; that plaintiff's defense was
 inadmissible under which plaintiff recovered and held the proceeds
 of the note and that the defendant's defense was not available
 against plaintiff as a holder of the note; that plaintiff was
 entitled to recover as against defendant and the plaintiff's
 recovery was not barred by the statute of limitations; that the
 action of the plaintiff was timely and the defendant's defense was
 not available in law and sustained the judgment for \$10,000.
 The court found that the plaintiff's defense was not
 available. The court found, as a matter of law, that the defendant was in-
 entitled and sustained the judgment as entered. The plaintiff's
 defense (and they were verified) all asserted that plaintiff, as
 a matter of fact, had notice of the defendant's defense at the time
 the note was issued and that the plaintiff was not a bona fide
 holder of the note and that plaintiff purchased with knowledge,
 plaintiff was not entitled to recover as a holder of the note. If plain-
 tiff took the note with notice as defendant alleged, he was not a
 holder in due course. Section 32, Ch. 93, Civ. Code, 1901.
 For the above reasons as a matter of law under the plain-
 tiff and defendant's defenses, the judgment will be
 reversed and the cause remanded for another trial.
 REVEREND AND HONORABLE,
 JUDGE, U.S., and Attorney, U.S., present.

41168

FRANK PAMINIS,

Appellee,

v.

INSPIRATION PLACERS, INC., a
Corporation and GEORGE FORD,
Appellants.

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MARCHETT DELIVERED THE OPINION OF THE COURT.

307 I.A. 241

Defendant appeals from a judgment in the sum of \$1525.50, entered against him jointly with the Inspiration Placers, Inc., a corporation, on the finding of the court. Plaintiff has filed a cross-appeal arguing that his total claim of \$2116.50 should have been allowed and asking this court to enter judgment for that amount in his favor.

Plaintiff's claim was for services said to have been rendered by him for the corporation from May 21, 1937, to March 15, 1939, and \$42 for petty cash said to have been advanced for the corporation at its request.

The defendant corporation had a gold mine located at Bowie, Arizona, and plaintiff went there to act as superintendent of it. Plaintiff had been theretofore employed by Ford in his Chicago business, and Ford admits that in a letter written by him to plaintiff on December 11, 1937, in order to induce plaintiff to continue in the service of the corporation, he guaranteed sums then and thereafter to become due to plaintiff for his services. The defense interposed was that Ford in later letters (one of January 29, 1938, which is defendant's Exhibit 7 and another of May 16, 1938, which is defendant's Exhibit 8) revoked and cancelled this guaranty.

The evidence as to the amount due from the corporation to plaintiff is conflicting. There was evidence tending to show that in the month of September, 1938, plaintiff was notified and accepted a cut in his salary (which theretofore was \$250 per month) to \$150. There was also evidence tending to show his employment ended on January 15,

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1939, instead of March 18, 1939, as claimed. The trial judge saw the witnesses. We cannot say his finding as to the amount due plaintiff is against the manifest preponderance of the evidence. For that reason we may not enter a judgment here for the larger sum plaintiff asks.

For the same reason we think the judgment against Ford may not be reversed. It is true, as Ford contends, that his guaranty was in its nature a continuing guaranty which could be revoked at any time on notice. American and English Ency. of Law, vol. 14, 2nd ed., p. 1160; Mamrow v. Nat'l Lead Co., 206 Ill. 626; Rapp v. Phoenix Ins. Co., 113 Ill. 390; Columbia Graphophone Co. v. Nierwirth, 201 Ill. App. 397. Ford testified he wrote the letters revoking his guaranty, put them in stamped envelopes and mailed them to plaintiff at Bowie, Arizona. Plaintiff just as positively testified he never received these letters or either of them. Ford admits Exhibit No. 8 of the letters offered in evidence is only a copy. Ford does not produce any definite reply by plaintiff to either letter, and in an extended correspondence which continued up to the time that plaintiff quit work there is not a letter written by Ford to plaintiff which would indicate the guaranty had been revoked. On the contrary, in many of these letters Ford remitted money to plaintiff, and in one of them told plaintiff he he needed money "to jack me up" (meaning Ford).

The trial judge said that the subsequent letters were inconsistent with the theory the guaranty had been revoked, and we think so too. In the course of the trial evidence was given by plaintiff's attorney to the effect that the letter marked Exhibit No. 8 had never been in his possession, although he said he might have seen it when plaintiff's deposition was taken. Defendant cites Bright v. Buchanan, 287 Ill. 468, to the point that evidence thus given will be closely scrutinized and is entitled to little weight. That is the law which we assume the trial court followed. We find no reversible error in the record, and the judgment will be affirmed.

JUDGMENT AFFIRMED.

O'Connor.

McSurely, J., concur.

1932, instead of March 15, 1935, as claimed. The trial judge was the witness. He cannot say his finding as to the amount and character of the plaintiff's expenditures at the trial, for that reason we say not only a judgment but for the larger and plaintiff sake.

For the same reason we think the judgment against the plaintiff not be reversed. It is true, as the defendant, that the plaintiff was in the nature a continuing plaintiff which would be reversed at any time on notice. American and English Law, 2d ed., Vol. 14, 1932, 23. 4. 1180; Monroe v. Hall, 100 U.S. 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Letters offered in evidence is only a copy. There have not been any letters offered in evidence to which the plaintiff is entitled to see. The plaintiff's copy of the letters which contained up to the time that plaintiff's copy was there is not a letter written by him to plaintiff which would in- dicate the quantity had been received. On the contrary, in each of these letters there was written money to plaintiff, and in one of them told plaintiff he needed money "to keep me up" (meaning money).

The trial judge said that the defendant's letters were in- consistent with the theory the quantity had been received, and we think so too. In the course of the trial evidence was given by plaintiff's attorney in the effect that the letters were written by him, and that he had been in his possession, although he said he might have seen it when plaintiff's attorney was asked. Defendant also asked Monroe v. Hall, 100 U.S. 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

41108

PEOPLE OF THE STATE OF ILLINOIS,

BRON TO

Defendant in Error,

MUNICIPAL COURT

v.

ROBERT ALLEN,

OF CHICAGO.

Plaintiff in Error.

307 I.A. 241²

MR. PRESIDING JUSTICE REBEL DELIVERED THE OPINION OF THE COURT.

This case was consolidated by leave of Court for the purpose of a hearing with three other cases in which writs of error had been issued to the Municipal Court of Chicago. All of the cases were heard on the same evidence and in the same proceeding in the Municipal Court. The brief and abstract of record in this case is being considered by this court as the brief and abstract of record in each of the other cases. The consolidated numbers in this court are Nos. 41103, 41108, 41109 and 41110. In case No. 41103, entitled People v. Thomas Murphy, the defendant, Thomas Murphy, having died since the appeal was taken, an order has heretofore been entered by this court, on motion of attorneys for Thomas Murphy suggesting his death, abating the writ of error.

The form of action is a criminal prosecution by the People of the State of Illinois, plaintiff, v. Robert Allen, defendant, in the Municipal Court of Chicago, upon an information filed. The defendant was charged in the information that he "did then and there unlawfully and wilfully keep a room on the premises located at 34 No. Halsted St., in the City of Chicago, County of Cook, State of Illinois, for the purpose of recording and registering bets and wagers on the speed of a beast, to-wit; a horse in violation of Paragraph 330, Chapter 38, Smith-Hurd's Illinois Revised Statute 1931." The defendant was arraigned and entered a plea of not guilty, and a trial was had by a jury, which jury made a finding of guilty in manner and form as charged in the information. A judgment was entered by the court on the verdict adjudging the defendant guilty of the criminal offense in the language of the

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charge contained in the information, and the defendant was sentenced to pay a fine of \$400, and costs taxed at \$8.50; and the judgment contained a further order that the fine be paid in cash or labor in the House of Correction until the fine and costs were paid or worked out at the rate of \$1.50 per day for each day's work or the defendant discharged according to law. An execution was ordered to issue against the defendant for the fine and costs and he was ordered committed to the House of Correction of the City of Chicago. It was further ordered that an execution issue against the defendant for the amount of the fine and costs and the mittimus was stayed fifteen days and the defendant given sixty days to file a bill of exceptions. The pleadings in the case are the information and the plea of not guilty.

The defendant urges that the information attempting to charge the statutory offense under "An Act to Prohibit Book-Making and Pool-selling, Approved May 31, 1887, L. 1887, p. 95", and omitting to allege the phrase "with any book, instrument, or device", charges no offense under the laws of the State of Illinois, and that the judgment and conviction rendered upon such information is void for want of jurisdiction of the subject matter, and the judgment should be reversed and the defendant discharged. In the case at bar it is contended that the information fails to charge any crime known to the laws of the State of Illinois, and particularly to charge any crime under "An Act to prohibit book-making and pool-selling, approved May 31, 1887, L. 1887, p. 95" (Ch. 38, Sec. 336, Ill. Rev. Stat. 1939, State Bar Assn. Ed.) upon which this prosecution is based. The provisions of the statute insofar as it is necessary to quote the language of the act provides "That any person who keeps any room, * * * with any book, instrument or device for the purpose of recording or registering bets or wagers, or of selling pools, or any person who records or registers bets or wagers, or sells pools upon the result of any trial or contest of skill, speed or power of endurance of man or beast * * * shall be punishable by imprisonment

charge contained in the information, and the defendant was sentenced to pay a fine of \$100, and costs taxed at \$10; and the judgment contained a further order that the fine be paid in cash or labor in the House of Correction until the fine and costs were paid or satisfied out of the rate of \$1.50 per day for each day's work at the defendant's employment according to law. An execution was ordered to issue against the defendant for the fine and costs and he was ordered to appear to the House of Correction of the City of Chicago. It was further ordered that an execution issue against the defendant for the amount of the fine and costs and the execution was stayed fifteen days and the defendant given sixty days to file a bill of exceptions. The findings in the case are the information and the fact of not guilty. The defendant argues that the information attempting to charge the statutory offense under "an act to regulate book-binding and book-binding, approved May 21, 1887, c. 127, § 1, and omitting to allege the phrase "with any book, instrument, or device," charges no offense under the laws of the State of Illinois, and that the judgment and conviction rendered upon such information is void for want of jurisdiction of the subject matter, and the judgment should be reversed and the defendant discharged. In the case at bar it is contended that the information fails to charge any crime known to the laws of the State of Illinois, and necessarily in violation of the provisions of the statute inserted as it is necessary to quote the language of the act provided "that any person who books, or binds, or repairs, or exchanges, or otherwise handles, for the purpose of vending or circulating, any book, instrument, or device, or any part thereof, or any other matter, in violation of the provisions of the act, shall be fined not less than \$100, nor more than \$500, and shall be imprisoned not less than thirty days, nor more than six months, and shall be liable to pay the costs of the prosecution."

in the County Jail for a period not longer than one (1) year, or by fine not exceeding \$5,000 or both. Provided, however, that the provisions of this Act shall not apply to the actual enclosure of fair or race track associations that are incorporated under the laws of this state, during the actual time of the meetings of said associations, or within twenty-four hours before any such meetings."

The defendant's theory is that the information in the case at bar attempts to charge an offense under the Act, but fails to charge a statutory crime because of the omission from the information of an essential element contained in statutory definition of the crime, to-wit; "with any book, instrument or device." It is further contended that, the information failing to charge any crime, the court had no jurisdiction of the subject matter, and having no jurisdiction of the subject matter, the judgment of conviction is void, and should be reversed and the defendant discharged. Defendant cites in support of this contention, People v. Board, 370 Ill. 140, wherein the court said:

"No rule of law is better settled than that an indictment or information must charge all the elements of the offense. As we said in People v. Sheldon, 323 Ill. 70: 'An indictment or information charging an offense defined by statute should be as descriptive of the offense as is the language of the statute and should allege every substantial element of the offense as defined by the statute.' The information here, put to that test, does not charge the defendant with any offense known to the law."

Defendant suggests that the phrase omitted from the information in the case at bar was contained in the statute defining the crime, and that the omission of this phrase rendered the information void, because without it there was no crime charged.

On the other hand, from the brief filed by the People, it is contended that the information is not fatally defective and void because of a failure to set forth the phrase "with any book, instrument or device." It is further contended that the information sufficiently charges a crime, and that even if the information was defective in form, defendant should have taken advantage of this before the trial.

in the County Jail for a period not longer than one (1) year, or by fine not exceeding \$5,000 or both. Provided, however, that the provisions of this act shall not apply to the actual execution of any such Greek associations and the investigation under the laws of this state, during the actual time of the meeting of said associations, or within twenty-four hours before and after meetings.

The defendant's theory is that the information in the case

at her attempt to charge an offense under the act, but that in charge a statutory crime because of the relation from the information of an essential element contained in statutory definition of the crime, to-wit: "with any goal, knowledge or motive." It is contended that the information failing to charge any crime, the court had no jurisdiction of the subject matter, and having no jurisdiction of the subject matter, the judgment of conviction is void, and should be reversed and the defendant discharged. Defendant offers in support of this contention, People v. Jones, 200 Ill. App. 120, wherein the court said:

"The rule of law is better stated than found in any authority. It is that the information must contain all the elements of the offense. It is not enough to say, 'with any goal, knowledge or motive' as in People v. Jones, 200 Ill. App. 120. The information must contain all the essential elements of the offense as stated in the statute. The information must, and in that case, it did not charge the defendant with any offense known to the law."

Defendant suggests that the offense charged in the information is that the defendant was convicted in the state within the state, and that the omission of this phrase rendered the information void, because without it there was no crime charged.

On the other hand, from the rules filed by the people, it is contended that the information is not fatally defective and void because of a failure to set forth the phrase "with any goal, knowledge or motive." It is further contended that the information sufficiently charges a crime, and that even if the information was defective in that, defendant should have taken advantage of this before the trial.

In support of these contentions, the People cite Commonwealth v. Perry, 146 Mass. 303, 15 N. E. 484, in which it is suggested that the identical question now before this court was presented. In that case the complaint failed to allege that the apparatus, books or other devices referred to, were fitted or intended for the purpose of registering bets, and the court there said;

"It was not necessary to describe the method or manner of registering bets or selling pools, or the particular contests which were made the subject of gambling. The defendant was sufficiently informed of the charge against him, although the indictment did not go into minute detail."

And further, in Commonwealth v. Clancy, 154 Mass. 128, 27 N. E. 1001, the court held that a complaint which only alleges the registering of bets is sufficient. In People v. Semmler, 345 Ill. 372, called to our attention, the Supreme Court in construing the statute prohibiting book-making, said that the exception stating that the act shall not apply to the actual enclosures of fair or race-track associations lawfully incorporated and in operation need not be negatived in an information charging the offense, as the exception or proviso has to do only with circumstances under which the act itself does not apply and has nothing to do with the description of the offense.

Plaintiff argues that, whereas, the New York courts in construing its statute on book-making maintain that the exception must be pleaded in the information or else it is fatally defective and can be attacked by a motion in arrest of judgment, and that, therefore, the New York decisions cited by defendant in this action are not applicable in Illinois under the interpretation of the statute in the case of People v. Semmler, supra.

Upon consideration of the question involved, we have before us as suggested by defendant two offenses; first, "that any person who keeps any room, " * " with any book, instrument or device for the purpose of recording or registering bets or wagers, or of selling pools, " * " and second "or any person who records or registers bets or wagers, or sells pools upon the result of any trial or contest of skill, speed or power of endurance of man or beast " * " Defendant

other devices referred to, were fitted or intended for the purpose of registration before and the Court there said:

It was not necessary to investigate the matter in detail. The investigation was limited to the fact that the subject was a member of the Communist Party, and that he was a member of the Communist Party of the United States of America. The investigation was limited to the fact that the subject was a member of the Communist Party, and that he was a member of the Communist Party of the United States of America.

and further, in James v. United States, 136 U.S. 287, 10 S.Ct. 1028, 34 L.Ed. 1013, the Court held that a complaint which only alleges the registration of a person is not sufficient to establish a violation of the law. In James v. United States, 136 U.S. 287, 10 S.Ct. 1028, 34 L.Ed. 1013, the Court held that a complaint which only alleges the registration of a person is not sufficient to establish a violation of the law.

The New York decision cited by reference in this action was not
allowed in Illinois under the interpretation of the statute in
the instant case.

1. The classification of the material received, as being "sensitive" or "confidential" is determined by the nature of the information received, and the degree of its sensitivity to the national defense.

suggests that under the first offense, because the words "with any book, instrument or device" was omitted, no charge of violation of this statute is made, and that, therefore, the court erred in entering judgment on the verdict of the jury. However, when we come to consider the second provision called to our attention in language as above stated it would seem that the defendant has violated the statute if he recorded or registered bets or wagers, or sold pools upon the result of any trial or contest of skill, speed or power of endurance of man or beast. When we consider further that the evidence that was presented to the court and jury was omitted from the record and has not been preserved by defendant, we have the right to assume that there was evidence offered that justified the verdict of guilty and the punishment as provided for in the judgment entered by the court. We feel that under the circumstances as we have them before us, the offense was charged within the language of the statute and the defendant was notified of the charge sufficiently to be able to present his defense, and for the jury, to understand the offense and for the court to pass judgment upon the verdict. (People v. Donaldson, 341 Ill. 389).

In People v. Cohen, 303 Ill. 523, the Supreme Court in part said:

" * * * great niceties and strictness of pleading should only be countenanced and supported when it is apparent that defendant may be surprised on the trial, or unable to meet the charge or make preparation for his defense for want of greater certainty or particularity."

We are of the opinion that the court did not err in entering a judgment on the verdict of guilty that was returned by the jury. It is further contended by the defendant that the judgment was void in that the court ordered as part of the judgment that the fine and costs be worked out in default of payment; but, it would seem from the Criminal Code, Sec. 391, ch. 38, Ill. Rev. Stat. 1939, State Bar Assn. Ed., that any person convicted in a court of record of any misdemeanor under the Criminal Code may be

suggests that under the first witness, because the words "with
my book, instrument or device" was omitted, no charge of violation
of this statute is made, and that, therefore, the court acted in
entering judgment on the verdict of the jury. However, when we come
to consider the second violation called to our attention in paragraph
as above stated it would seem that the defendant has violated the
statute as it is amended as to intent only, and not as to intent of
upon the receipt of any thing or contents of mail, or upon the
violation of law or breach, then we consider further that the
evidence that was presented to the court and jury was sufficient
the record and has not been preserved by defendant, we have the
right to assume that there is evidence sufficient that justice was
verdict at guilty and the defendant as provided for in the judgment
entered by the court, so that under the circumstances as we
have them before us, the defendant was charged with the violation
of the statute and the defendant was notified of the charge
sufficiently so as to be able to present his defense, and for the jury
to understand the charges and for the court to have judgment upon
the matter. (People v. Robinson, 308 Ill. 303.)
In People v. Robinson, 308 Ill. 303, the Supreme Court in

... great mistakes and misconceptions of law and equity
only be understood and appreciated when it is recognized that
defendant may be entitled on the trial, or unable to meet the
charge or make explanation for his defense law and of knowledge
certainty or particularly.
The view of the opinion that the court did not say in
reversing a judgment on the verdict of guilty that was returned by
the jury. It is further suggested by the defendant that the
judgment was void in that the court acted in error of the judgment
that the fine and costs be taken out in behalf of payment; but
it will be seen from the principal case, 308 Ill. 303, that
the court, 308 Ill. 303, that any person convicted in a
court of record of any misdemeanor under the Criminal Code may be

required to work out such fine and costs at the rate of \$1.50 per day. (People v. Herman, 346 Ill. App. 94; People v. Carey, 346 Ill. App. 100.)

From a consideration of the record in this case, we are of the opinion that there is no error in this record that would justify a reversal and accordingly the judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, J. CONCURS.

DENIS E. SULLIVAN, J. SPECIALLY CONCURRING:

I agree with the conclusion, but not with all that is said.

remained to seek out and locate at the time of the case.

See, People v. Harris, 111 Cal. 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

From a consideration of the record in this case, we

are of the opinion that there is no error in this record that would

justify a reversal and accordingly the judgment is affirmed.

FORWARDED BY MAIL.

WILLIAM J. HARRIS.

WILLIAM J. HARRIS, JR.

I agree with the conclusion, but not all that is said.

41109

PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

v.

ELLIS GREENBERG,

Plaintiff in Error.

APPEAL TO

MUNICIPAL COURT

OF CHICAGO.

307 I.A. 241³

MR. PRESIDING JUSTICE NEBEL DELIVERED THE OPINION OF THE COURT.

Having considered this case under consolidated case No. 41106, the cases having been heard on the same evidence and in the same proceeding in the Municipal Court, and consolidated by leave of court for the purpose of hearing in this court, the opinion that we have filed in case No. 41106 applies and controls in this case.

Accordingly the judgment of the trial court is affirmed.

AFFIRMED.

BURKE, J. CONCURS

DENIS E. SULLIVAN, J. SPECIALLY CONCURRING AS IN 41108:

I agree with the conclusion, but not with all that is said.

ALICE

REPORT OF THE JURY IN CASE NO. 11108

Case No. 11108

Case No. 11108

Case No. 11108

Case No. 11108

3 11108 A. 241

ALICE

Having considered this case with considerable care

No. 11108, the case having been heard on the same evidence and

in the same proceeding in the Municipal Court, and considering

the issue of guilt for the charges of being in this court, the

verdict that we have filed in case No. 11108 applies and concludes

in this case.

Accordingly the judgment of the trial court is affirmed.

WITNESSES

WITNESSES

WITNESSES

I agree with the conclusion, but not with all that is said.

41110

PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

v.

JOHN HAMASHLA,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

307 I.A. 241⁴

MR. PRESIDING JUSTICE NEBEL DELIVERED THE OPINION OF THE COURT.

Having considered this case under consolidated case No. 41108, the cases having been heard on the same evidence and in the case proceeding in the Municipal Court, and consolidated by leave of court for the purpose of hearing in this court, the opinion that we have filed in case No. 41108 applies and controls in this case.

Accordingly the judgment of the trial court is affirmed.

AFFIRMED.

BURKE, J. CONCURS

DENIS E. SULLIVAN, J. SPECIALLY CONCURRING AS IN 41108:

I agree with the conclusion, but not with all that is said.

REPORT OF THE STATE OF ILLINOIS

DEPARTMENT OF JUSTICE

INVESTIGATION

AT CHICAGO

1908

REPORT OF THE

1908 I.A. 241

AT CHICAGO, ILLINOIS, DURING THE MONTH OF MAY, 1908.

REPORT MADE BY THE CHIEF OF POLICE, CHICAGO.

THE CHIEF OF POLICE, CHICAGO, HAS THE HONOR TO REPORT THAT

IN THE MONTH OF MAY, 1908, THE FOLLOWING CASES WERE HANDLED BY THE

CHIEF OF POLICE, CHICAGO, IN THE MONTH OF MAY, 1908.

THE CHIEF OF POLICE, CHICAGO, HAS THE HONOR TO REPORT THAT

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CHIEF OF POLICE, CHICAGO, IN THE MONTH OF MAY, 1908.

THE CHIEF OF POLICE, CHICAGO, HAS THE HONOR TO REPORT THAT

IN THE MONTH OF MAY, 1908, THE FOLLOWING CASES WERE HANDLED BY THE

CHIEF OF POLICE, CHICAGO, IN THE MONTH OF MAY, 1908.

41117

PEOPLE OF THE STATE OF ILLINOIS,

APPEAL FROM

Appellate.

v.

CRIMINAL COURT

CHARLES PURKA,

Appellant.

COOK COUNTY.

307 I.A. 242

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant to reverse an order of the Criminal Court of Cook County sustaining the state's amended motion to dismiss a written motion filed by defendant in the nature of a writ of error coram nobis provided for by section 72 of the Practice Act.

The defendant was indicted and convicted of larceny of property of the value of \$30.00 in the Criminal Court of Cook County. The facts stated in defendant's amended motion in the nature of a writ of error coram nobis appear to be that when the defendant was arraigned on the indictment before the Honorable Michael L. McKinley, chief justice of the criminal court, it appearing that he was wholly without funds to employ a lawyer, Benjamin C. Bachrach, the public defender of Cook County was appointed to represent him; and that, thereafter, one, Morris H. Sachs, represented to the defendant that he was an assistant public defender, and the defendant, believing that he was the attorney appointed and selected by the court to represent him and having full faith and confidence in said Morris H. Sachs made a full and true statement of the facts in connection with the charge against him, and relied wholly upon said Morris H. Sachs to present all and any of his legal defenses to the crime with which he was charged and to carefully prepare and present his defense upon the trial of the cause. It further appears from the facts stated in the written motion that the defendant had never been arrested, had had no experience in courts of law, and had no knowledge of legal procedure; that he had no knowledge of the difference and distinction between the crimes of petty larceny and

OFFICE OF THE ATTORNEY GENERAL

[Handwritten signature]

CHARLES W. ...

807 L.A. 115

... THE ...

This is an affidavit of the defendant in support of his motion to ...

The Criminal Court of Cook County ...

... of a writ of error coram nobis ...

Practice Act.

The defendant was indicted and convicted of January 10 ...

property of the value of \$100.00 in the Criminal Court of Cook County.

The facts stated in defendant's motion are as follows: ...

a writ of error coram nobis ...

was returned on the indictment before the defendant ...

... the Criminal Court of Cook County ...

he was wholly without fault in having a lawyer, ...

the public defender of Cook County was appointed to represent him;

and that, notwithstanding, ...

defendant that he was an innocent ...

believing that he was the attorney appointed and selected by the ...

court to represent him and having full faith and confidence in ...

Morris E. Sachs was a full and true ...

connection with the charges against him, and ...

Morris E. Sachs be present all and any of his legal ...

crime with which he was charged and be ...

his defense upon the trial of the cause. If ...

the facts stated in the written motion that the defendant had never ...

been convicted, but had no experience in courts of law, and had ...

no knowledge of legal procedure; that he had no knowledge of the ...

affidavit and distinction between the crimes of petty larceny and ...

grand larceny or of the difference in the punishment provided for the respective crimes; that he had no knowledge as to the value of the telephone cable which he was charged with stealing. It is further alleged that defendant did not at any time authorize said Morris H. Sachs either to represent him as his attorney or to waive a jury or enter a technical plea of not guilty or to stipulate to any evidence on his behalf; that Morris H. Sachs is not the public defender of Cook County, that he was not an assistant public defender of Cook County, and that he had at no time been appointed as assistant public defender. It further appears that as soon as the defendant was brought into the courtroom of Judge William J. Lindsey for trial on April 8, 1939, the said Morris H. Sachs was the first to address the Court stating "technical plea of not guilty, jury waived, stipulate as to evidence." It further appears that Morris H. Sachs stipulated that the value of the property alleged to have been taken by the defendant was \$30, whereas, in truth, it is alleged that the value of said property, now, was \$5.00, and that, but for the negligence and improper and unauthorized conduct of Morris H. Sachs in stipulating to the value of the said property, there would have been no evidence before the Court upon which a finding could be based fixing the value of the property taken; and that the errors of fact as charged occurred without any negligence on the part of the defendant, and that he was thereby deprived of a substantial defense which he could have made at his trial.

The amended motion in the nature of a writ of error coram nobis was supported by the affidavit of the defendant, Charles Furke, who swore to the facts contained in the motion, and by the affidavit of Harry Frits, manager of the telephone department of the Graybar Electric Company, Inc., who made oath that the Graybar Electric Company was engaged in the manufacture and sale of electric goods and equipment, including telephone cable, and that from affiant's experience the retail price of twenty-five feet of the cable described in the indictment was twenty cents per foot, f. o. b. Chicago.

...the respective owner; that he had no knowledge as to the value of the telephone cable which he was charged with installing. It is further alleged that defendant did not at any time communicate with Morris M. Cohen either by conversation or by letter or by any other means, and that he did not at any time consult with any other person in connection with the installation of the telephone cable. It is further alleged that defendant was charged with the installation of the telephone cable on April 4, 1936, and that Morris M. Cohen was the first to observe the same and to report the same to the jury. It is further alleged that Morris M. Cohen testified that the value of the property alleged to have been taken by the defendant was \$10,000, whereas, in truth, it is alleged that the value of said property was \$2,500, and that, but for the negligence and improper and unauthorized conduct of Morris M. Cohen in attempting to take value of the said property, the same would have been sold for \$2,500, and that the jury could be found fixing the value of the property taken; and that the error of fact as charged occurred without any negligence on the part of the defendant, and that he was thereby acquitted of a substantial defense which he could have made at his trial.

The requested action in the nature of a writ of error coram nobis was supported by the affidavit of the defendant, Charles Fuchs, who swore to the facts contained in the petition, and by the affidavit of Harry Little, manager of the telephone department of the Greater Electric Company, Inc., who swore that the Greater Electric Company was engaged in the manufacture and sale of electric cable and equipment, including telephone cable, and that from defendant's experience the retail price of twenty-five feet of the

The State filed an amended motion to dismiss which, after arguments heard, was overruled by the Court, and the state was thereupon directed to answer the amended motion. The State filed its answer in which none of the material allegations contained in defendant's motion were denied. When the cause came on for hearing, on the motion and answer thereto, the state's attorney made an oral motion for leave to withdraw its answer, and the Court thereupon allowed the state to withdraw its answer and sustained the State's amended motion to dismiss which had been previously denied. The Court thereupon entered an order denying the defendant's amended motion filed under section 72 of the Practice Act.

The defendant contends that the court erred in sustaining the amended motion of the plaintiff to dismiss the defendant's amended petition in the nature of a writ of error coram nobis and in denying defendant's said amended motion. The purpose of the motion in the nature of a writ of error coram nobis is defined by our Supreme Court in the case of People v. Crooka, 326 Ill. 360, 360, wherein the court stated in part as follows:

"Errors of fact which may be availed of on a writ of error coram nobis or under section 80 of our Practice act include duress, fraud and excusable mistake. " * " The writ of error coram nobis, or a motion under our statute, is an appropriate remedy in criminal as well as civil cases. Such a writ lies to set aside a conviction obtained by duress or fraud, or where by some excusable mistake or ignorance of the accused, and without negligence on his part, he has been deprived of a defense which he could have used at his trial and which if known to the court would have prevented a conviction. " * " The sufficiency of the motion which is regarded as a declaration in a writ of error coram nobis, or a motion under the statute, must be raised by demurrer, plea of nullo est erratum, by motion to dismiss, by pleading special matter in confession and avoidance, or by making an issue of fact by traversing the declaration."

The defendant states that the outstanding fact in the case is that because a lawyer, without any investigation or preparation of the case for trial, stipulated that the value of 85 feet of telephone cable was \$30 when, in truth and in fact, the value was \$5.00, the defendant was wrongfully convicted of larceny and sentenced to the penitentiary for an indeterminate term of from one to ten years; and that the true value of the property was a full and complete defense to the crime of larceny as charged.

the other end of a line, which is only used, not

[illegible][illegible]

The defendant contends that the court erred in concluding that the defendant was not entitled to a writ of habeas corpus. The defendant argues that the court's decision was based on an incorrect interpretation of the law. The defendant claims that the court failed to consider the relevant precedents and the facts of the case. The defendant asserts that the court's decision was arbitrary and capricious. The defendant requests that the court grant a writ of habeas corpus and set aside the defendant's conviction and sentence.

1. The first of these is the fact that the Government has not been able to establish a reliable system of accounting for the money which it has received from the public. This is a serious defect in the system of public finance, and it is one which must be remedied if the Government is to be able to manage its affairs properly.

The defendant stated that the accompanying book in the case is that because a lawyer, without any investigation or preparation of the case for trial, advised that the value of the book of telephone cards was \$250,000, in fact, in fact, the value was \$250,000, the defendant was originally convicted of larceny and sentenced to the penitentiary for an indeterminate term of ten to fifteen years and that the value of the property was \$250,000.

Counsel for the defendant urge that the assistant Public Defender, that appeared for the defendant at the trial as defendant's attorney, did not properly present the defense that should have been urged on behalf of defendant, and that by reason of his action the defendant was deprived of the defense that the value of the property that was involved in the charge of larceny was not \$30.00, but was as a fact worth only \$5.00, and that, therefore, by his failure to urge the question, the defendant was found guilty of larceny of property of the value of \$30.00 and punished by being incarcerated in the penitentiary for such act. The fact is, however, that the office of Public Defender is provided for by Statute in Chapter 34, secs. 163-c to 163-j, inclusive, Illinois Revised Statutes, 1939, and the act provided for the appointment of assistants to such Public Defender. When this assistant appeared before the Court it does not appear that at any time during the course of the trial an objection was made by defendant to his serving as counsel. It is the rule that in order to take advantage of facts complained of, objection must be made to the court so that the court could pass upon the items complained of. We must remember that in order that advantage be taken of any acts that appeared at the trial, the act complained of must be made known to the court.

The Court in the case of People v. Brooks, 336 Ill. 356, held that fraud on the part of the opposing party or his counsel that prevents one from making his defense is such an error of fact as can be availed of on writ of error coram nobis or under the statute aforesaid. The writ of error coram nobis, or a motion under said statute, is an appropriate remedy in criminal cases as well as in civil cases. The court further held that such a writ lies to set aside a conviction obtained by duress or fraud, or where by some excusable mistake or ignorance of the accused, and without negligence on his part, he has been deprived of a defense which he could have used at his trial and which if known to the court would have prevented a conviction. The facts, however, as stated in the petition filed by the defendant, were known to the Court.

...the defendant was not the defendant ...
...that ...
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...on behalf of ...
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...conscious ...
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...used at his ...
...a conviction ...
...by the ...

The other suggestion that seems to be urged by the defendant is the fact that the assistant public defender had stipulated to the value of 25 feet of telephone cable as being \$30.00, and that no evidence was offered on behalf of defendant that would indicate otherwise; but it does appear that the issue of value was before the court and that defendant by his attorney offered in evidence the witness, James J. Cunningham, and he testified that he fixed the value before the justice of the peace at the preliminary hearing of this matter at \$8.50. It is suggested by counsel for the State that no doubt defendant's counsel had a justifiable reason for assuming that in view of the fact that witness Cunningham had previously fixed the value of the property at \$8.50 that the trial court would, if he were in doubt as to the value, resolve that doubt in favor of the defendant, and on the other hand it seems that the court was convinced that the value of the property was \$30.00. And so, in considering these facts, the question was squarely before the court. In Douglas v. Watson, 80 Ill. App. 343, 347, this court said:

"It is apparent from these authorities that the fact upon which the error is predicated, in order to avail under this writ, must be matter not part of the issues tried by the court, but something aliunde, which, if presented to the court at the trial, would have absolutely precluded the judgment as rendered, and not a fact merely bearing upon the issues adjudged, however conclusive it might have been of such issues. It is at least questionable if the scope of the writ at common law, and hence of the action, which is here a substitute for it, is not limited by well established practice to such cases as are enumerated in the text and decisions above quoted. But it is in any event quite clear that it has never had, in the practice of the common law, a scope wide enough to reach any error of fact, which was embraced in the conclusion of the court upon the issues of fact adjudged, whether error in passing upon facts submitted or an erroneous conclusion, because certain facts, which would have been conclusive of the issues, were not presented."

This decision was based upon an action which was in the nature of a writ of error coram vobis, and in determining the question now involved, we believe it to be conclusive on the question we have here. If the defendant wished to appeal from the decision of the court, of course, he could have taken the action to the appellate court and have the court pass upon the question as to whether the evidence justified the judgment entered by the court. No objections were made - he seeks to overcome the force of the conclusion reached

by the court by questioning the facts that were heard on the trial. It appears from the record as we find it that the questions before the court below were that the evidence did not justify the verdict rather than that there was a concealment of facts through fraud or subterfuge.

There was also a further question called to our attention by the State Attorney, and that is that the defendant is free on parole and for that reason, being on parole, that defendant waived his right to this appeal. However, we are not inclined to agree with the contention of counsel. It does appear that defendant is on parole, and that his release from the penitentiary is conditional. The conviction is still in force as governed by the statute, which is chapter 38, sec. 807, Ill. Rev. St., 1933, which reads in part as follows;

" * * * and, provided, further that all prisoners and wards so temporarily released upon parole, shall, at all times, until the receipt of their final discharge, be considered in the legal custody of the officers of the Department of Public Safety, and shall, during the said time, be considered as remaining under conviction for the crime or offense of which they were convicted and sentenced or committed and subject to be taken at any time within the enclosure of such penitentiary, reformatory and institution herein mentioned. * * *"

This contention was called to our attention by the State's Attorney by motion to dismiss the appeal, which motion was denied, but leave given to file an additional brief. In view of the fact that we have passed on the merits, it will not be necessary to pass on this question as asked by the state.

For the reasons we have indicated, the order that was entered by the court dismissing the written motion that was filed by defendant in the nature of a writ of error coram nobis is affirmed.

AFFIRMED.

BURKE, J. AND SULLIVAN, J. CONCUR.

rather than that there was a concealment of goods although from the
the court below were that the evidence did not justify the verdict.
It appears from the record as we think it that the evidence before
by the court by considering the facts that were found on the trial.

There was also a further provision which in our opinion was the result of the fact that the Government is then an agent and the fact that the Government is then an agent and the fact that the Government is then an agent.

1. The first of these is the fact that the
2. Government has not been able to
3. maintain a consistent policy
4. in the treatment of the
5. Chinese in the past. This
6. has been a major factor in
7. the development of the
8. Chinese community in the
9. United States. The Chinese
10. have been treated as a
11. separate and distinct
12. group, and this has led
13. to the formation of a
14. strong sense of identity
15. and loyalty to the
16. Chinese community. This
17. has been a major factor
18. in the development of the
19. Chinese community in the
20. United States.

A this question is asked in the same
that he has passed on the subject, it will not be necessary to take
but I have given to him an official report. In view of the fact
statement of subject to discuss the subject, I have written and passed
This investigation was made in accordance with the provisions of the Federal

For the reasons so fully explained, the writer must say that the reasons for the writer's decision to not publish the article are as follows:

18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 8

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41184

PEOPLE OF THE STATE OF ILLINOIS,)

APPEAL FROM

GLADYS WITTENMEYER,

CRIMINAL COURT

v.

COOK COUNTY.

CHARLES E. MITCHELL,

Appellant.

307 I.A. 243

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

ON July 15, 1939, Gladys Wittenmeyer swore to a complaint before a Police Magistrate at Oak Lawn, Cook County, Illinois, and therein charged that the defendant, Charles E. Mitchell, was the father of a female child which she delivered on May 8, 1939. Defendant was apprehended. He was granted a change of venue from the Police Magistrate to a Justice of the Peace. The latter heard the testimony offered by the respective parties and found that the child was born to the prosecutrix and that there was probable cause to believe that the defendant was the father. The Justice of the Peace required defendant to give bail in the sum of \$2,000 to answer the charge in the Criminal Court of Cook County. In the Criminal Court a jury was waived and the cause was submitted to the court. At the conclusion of the trial the court found that the defendant was the father of the child. A motion for a new trial was overruled. The court entered judgment on the finding, which required defendant to pay the prosecutrix the sum of \$1,100.00 as follows: \$300.00 in equal quarterly installments for the first year after the date of the birth of the child, and the sum of \$100 yearly for nine years succeeding the first year, also in quarterly installments. The defendant furnished a bond with surety, conditioned that he would pay the \$1,100.00 as required by the judgment order. He then filed this appeal for the purpose of reversing the judgment. Defendant's theory of the case is that "the testimony of the mother uncorroborated by other testimony or by surrounding circumstances is not sufficient to convict where the defendant at all times denied any act of intercourse with the mother, or that he was in any way responsible for the birth of the child." The theory of the prosecutrix, as stated

in defendant's brief, is "that the evidence adduced at the trial is sufficient for conviction."

The first criticism leveled at the judgment is that the testimony of the mother was uncorroborated. The second point urged is that the judgment is not supported by the evidence. The prosecutrix replies that her testimony was corroborated and that the judgment is supported by the evidence. These two points involve a consideration of the testimony. In order to better understand the case, we have carefully read the transcript of the testimony. Before discussing the testimony, it is timely for us to say that, proceedings in bastardy, being civil in their nature, the rules of evidence that govern in civil cases apply, and the paternity of a child may be proved by a preponderance of evidence alone and need not be established beyond a reasonable doubt. Where the evidence is conflicting, the issue as to whether the defendant is the father of the bastard child is a question of fact. Likewise, the credibility of the witnesses, the weight to be given their testimony, the opportunities for intercourse, the duration of the period of gestation, the constancy of prosecutrix's accusation, are all matters which are properly left to the jury, or to the trial judge when a jury is waived.

In summarizing the testimony, we note that Gladys Wittenmeyer, the prosecutrix, testified that in June, 1938, she was living with an older sister at South Moline, Illinois; that the sister was married; that she, the witness, was then 22 years of age; that she answered an advertisement for a housekeeper, which appeared in a Chicago newspaper; that she wrote to defendant, who lived at 3613 Cook Avenue, Oak Lawn, Illinois; that defendant replied to her letter and asked for a picture, which she sent to him; that defendant drove to South Moline on June 4th or 5th, 1938; that she accompanied him in his automobile which he drove to his home in Oak Lawn; that he told her she would have to take care of a "pair of twins that were two and a half years old at the time and do the housework"; that when

in defendant's trial, in that the evidence showed that the trial is

conducted in conformity with the law.

The latest evidence received at the judgment is that the

conduct of the mother was unreasonable. The second witness

is that the judgment is not supported by the evidence. The

trial judge has not testimony and circumstances and that the

judgment is supported by the evidence. The third witness

consideration of the testimony. In order to better understand the

case, we have carefully read the transcript of the testimony. It is

discussing the testimony, it is clearly for us to say that, considering

in history, being civil in their nature, the nature of evidence

that govern in civil cases apply, and the testimony of a civil

is given by a preponderance of evidence alone and need not be

established beyond a reasonable doubt. The evidence is

likewise, the issue as to whether the defendant is the father of the

plaintiff child is a question of fact. Likewise, the credibility of

the witness, the weight to be given their testimony, the circum-

stances for impeachment, the duration of the period of gestation, the

consistency of prosecutrix's recollection, the all matters which are

properly left to the jury, or as the trial judge when a jury is present.

In examining the testimony, we note that the witness

major, the prosecutrix, testified that in June, 1936, she was living

with an older sister at South State, Chicago; that the sister was

married; that she, the witness, was then 22 years of age; that she

answered an advertisement for a newspaper, which appeared in a

Chicago newspaper; that she wrote to defendant, who lived at 2015

Good Avenue, Oak Lawn, Illinois; that defendant replied to her letter

and asked for a picture, which she sent to him; that defendant drove

to South State on June 17th or 18th, 1936; that she accompanied him

in his automobile which he drove to his home in Oak Lawn; that he

told her she would have to take care of a pair of jeans that were

two and a half years old at the time and do the housework; that when

she arrived at his home she learned that he had four children; that there was an 18 year old boy, Charles Jr., and a 16 year old boy, William; that in addition to the four children in the house were a woman named Mrs. Rena Durham and her 3 year old daughter; that on the premises was a house which he had made into two apartments; that tenants were living upstairs; that the premises occupied by the 5 Mitchells, the 2 Durhams and Gladys consisted of a sun porch, a living room, a dining room, a bedroom and a kitchen; that one of the two older boys slept in the basement and the other one slept on the sun porch; that the twins slept in 2 cribs in the bedroom; that Gladys also slept in the bedroom; that defendant was a railroad man, and that his hours of employment varied; that defendant also slept in the bedroom "unless the older boys were up"; that if the two older boys were up, he slept on the davenport; that she arrived there on a Sunday and that Mrs. Durham and her daughter left on the following Thursday; that defendant told Mrs. Durham that Gladys was his cousin who was there on a visit and that he was going to ask Gladys to stay; that Mrs. Durham said her aunt was sick and she left on Thursday; that on the journey by automobile from South Eloit to his home defendant stopped out by the airport and made an improper suggestion to her; that after arriving in the vicinity of Chicago he "drove around the city a while. He didn't know whether to take me out to his home on account of that woman being there"; that Gladys and defendant arrived at the latter's home about midnight; that she slept on the day bed on the porch; that the first time she had intercourse with him was on Friday, the day after Mrs. Durham and her daughter left, which she fixed at about the 10th or 11th of June, 1938; that the act of intercourse took place in the bedroom where the twins slept; that she also had intercourse on the following evening and thereafter three or four times a week until the first part of September, 1938; that her last menstruation before the baby was on July 4, 1938; that the first part of September she found out that she was pregnant, that she had been sick to her stomach and dizzy;

she arrived at his home the morning after the 1st of June, 1932; that there was an 18 year old boy, Donald, and a 16 year old girl, William, both of whom were the only children in the home with a woman named Mrs. John Nathan and her 5 year old daughter; that the premises was a house which he had with two bedrooms; that there were living quarters; that the bedrooms consisted of the 3 bedrooms, the 2 bedrooms and a kitchen; that one of the two other boys slept in the basement and the other boy slept on the porch; that the other night in 2 weeks in the basement; that there also slept in the basement; that the other night in 2 weeks, and that his hours of employment were; that the other night in 2 weeks in the bedroom "unless the other night in 2 weeks; that the other boys were all he slept on the basement; that the other boys on a Sunday and that Mr. Nathan and his daughter left on the following Thursday; that the other night in 2 weeks; that the other boys were all he slept on a week and that he was going to see the other to stay; that Mr. Nathan said that he was going to see the other on the journey by automobile from there which he his home defendant offered out by the airport and made an arrangement suggested to her; that after arriving in the vicinity of Chicago he drove around the city a while. He didn't know whether to take me out to his home on account of that woman being there; that the defendant arrived at the lastest's home about midnight; that she slept on the day bed on the porch; that the first time she had intercourse with him was on Friday, the day after Mrs. Nathan and her daughter left, which she fixed at about the 10th or 11th of June, 1932; that the act of intercourse took place in the bedroom where the boys slept; that she also had intercourse on the following evening and thereafter three or four times a week until the first part of September, 1932; that her last menstruation before the baby was on July 4, 1932; that the first part of September she found out that she was pregnant; that she had been sick at her stomach and that;

that she talked to the lady upstairs; that "the lady upstairs told me"; that she then talked to defendant about her pregnancy, and that he, defendant "said it was a lie"; that later she had a further conversation with him about her pregnancy, and that "he sent me home about the 25th of September and told me it was a lie, but he beat me up before that"; that she went back to her sister's home at South Beloit; that when defendant hired her he agreed to pay her wages of \$5.00 a week; that during the period that she was working for defendant she did not receive any salary; that she was home with her sister two days, and that her sister sent her back; that she came back to the Mitchell home, and that when she returned to his home, his wife was there; that she again talked to him about her pregnancy and told him that he would have to help her out; that he said "it wasn't his and he laughed at me"; that he sent her back home; that she returned to South Beloit; that she came back to Chicago in November, 1938, and worked for a family on the south side; that three months before the baby was born, she went to the Jefferson Park Hospital in Chicago for the purpose of prenatal care; that she agreed to do work such as scrubbing and washing in order to pay for the hospital and medical charges; that defendant did not call on her while she was in the hospital, and that a female child was born on May 6, 1939. On cross-examination she stated that she was not a married woman, but that when defendant called on her at South Beloit she told him that she had been married to a sailor; she denied that she wrote a letter to defendant in which she said she had taken a picture "for just that occasion"; she then identified a letter dated June 1, 1938, as the one she wrote to defendant; that the eldest boy Charles slept in the basement; that William, the 16 year old boy, slept on the sun porch on an army cot; she denied that she at any time slept with William, and stated that he slept on the army cot and she slept on the day bed on the sun porch. She testified further, on cross-examination, that while she was sleeping on the day bed

that she talked to the lady regarding; that "the lady" was a woman who
was; that she then talked to defendant about her pregnancy, and
that he, defendant, said it was a lie; that after she had a further
conversation with him about her pregnancy, and told him that she
knew about the birth of defendant and said to him a lie, but he
told me up before the jury; that she went back to her sister's home at
Southfield; that when defendant asked her to go back to pay her
wages of \$6.00 a week; that during the period that she was working
for defendant she did not receive any salary; that she was home with
her sister two days, and that her sister told her back; that she
came back to the Southfield home, and that when she returned to his
home, his wife was there; that she again talked to him about her
pregnancy and told him that he would have to help her out; that he
said "it wasn't his and he wouldn't do"; that he told her back home;
that she returned to Southfield; that she came back to Chicago in
November, 1938, and worked for a family on the south side; that
three months before her baby was born, she went to see defendant
at Park Hospital in Chicago for the purpose of prenatal care; that she
agreed to do work such as scrubbing and washing in order to pay for
the hospital and medical charges; that defendant did not call on her
while she was at the hospital, and that a female nurse was born on
May 6, 1939. On cross-examination she stated that she was not a
married woman, but that when defendant called on her at Southfield
she told him that she had been married to a sailor; she denied that
she wrote a letter to defendant in which she said she had taken a
picture "for just that occasion"; she then identified a letter from
June 1, 1939, as the one she wrote to defendant; that the child
Ray Charles Clark is the defendant; that William, the 14 year old boy,
lived on the sun porch on an army cot; she denied that she or any
one else ever killed, and stated that he didn't like her very well
and was afraid of the day bed on the sun porch. She testified further

and William was sleeping on the army cot, defendant attempted to come into bed with her, but that she told him that William was sleeping there and that he "should have more sense, a man of his age"; that he then went back to the house. She was then asked questions in an attempt to impeach her on the basis of answers given at the hearing before the Justice of the Peace. She testified that "we told her [Mrs. Durham] that I was a cousin so as to have the respect of the community out there. No one knew that I had had the baby until I went back there after the baby was born". She denied that she did anything improper with respect to either of the two older boys. She admitted that she might have put her arm around the neck of either of the boys as a friendly gesture, and that defendant "bawled me out once because I was kidding with the oldest boy. I was helping him out with his studies and I was sitting on his knee one day and he bawled me out for it." She further testified on cross-examination that she wished to change her testimony on direct examination to the effect that defendant had not visited her at the hospital. She testified that he visited her once when she was working in the hospital laundry; that he did not give her any money. She was also asked questions purporting to show that in the preliminary hearing she testified he had visited her at the hospital two or three times. She answered that she understood that he had visited the hospital several times but that she saw him only once; that she was informed that he had come there on other occasions and that it is a rule of the hospital that no information is given out "when you work for your delivery"; that at the time the baby was born she did not give any name at the hospital; that the baby was then taken to the Cradle, an infant asylum in Evanston, Illinois, where she gave a fictitious name for the father of the child; that "we were told that we did not have to name the father"; that at the hospital she was not asked to name the father of the child; that the job of the hospital and the doctors is to deliver the child, and that they do not care who the father of the child is; that while she

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worked at the Mitchell home she went into Chicago a couple of times to visit a girl friend; that she did not go into Chicago while Mrs. Durham was at the house; that after going to Chicago she arrived home at 10 or 11 o'clock in the evening, and that she did not come in as late as 3 or 3 in the morning. She testified further that she had pictures taken but not for the purpose of sending a picture to defendant; also that she told him that she had some pictures taken for an "occasion just like this". She denied that she had intercourse with any one other than defendant; admitted that while she was at the Mitchell home she became acquainted with a boy in the neighborhood by the name of Lou Walters but that she was not going with him; that sometimes the Mitchell boys, Walters and herself played games at the Mitchell home, or in Walters's sister's home in the neighborhood; also that she visited Riverview Park in company with Walters and others.

Antoinette Thomas, called by the People, testified that she lived in a house about 35 feet from the Mitchell house; that she lived there since May, 1913; that she saw defendant "bring this girl"; that she saw defendant and the girl go shopping "or some place"; that she did not see Gladys coming or going from the Mitchell home with anyone else; that Gladys was a "very good watch girl". Mrs. Richard Adams, called by the People, testified that at the time she testified she lived about a block away from the Mitchells; that formerly she was a tenant of the defendant and rented the upstairs flat from January 1st to September 1st, 1933; that while she lived at the Mitchell home she washed in the basement; that she was then asked, "are there sleeping quarters downstairs?" and she answered, "there wasn't when I moved but they have made up two rooms down there since while I was living there"; Q. "while you lived there do you personally know who slept in the basement of the Mitchell home?" A. "Yes, sir." She then stated that she did not know Gladys, the prosecutrix, "last year"; that she met Gladys when she came back "this year".

... of the Mitchell home and went into ...
to visit a girl friend; that she did not go into ...
Mrs. ... of the house; that ...
arrived home at 10 or 11 o'clock in the evening, and that she did
not come in as late as 8 or 9 in the morning. She testified further
that she had ... taken but not for the purpose of making a
picture as defendant; also that she said that she had some
pictures taken for an occasion just like this. She denied that
she had conversations with any one about ...; admitted that
while she was at the Mitchell home she ... with a boy
in the neighborhood by the name of ... and that she was not
going ... Mitchell ...
played games at the Mitchell home; or in ...'s home in
the neighborhood; also that she visited ... in company
with ... and others.
-interviewed Thomas, called by the people, testified that she
lived in a house about 10 feet from the Mitchell house; that she
lived there since May, 1905; that she was defendant's ...
that she was defendant and she did not ... for some place; that
she did not see Gladys coming or going from the Mitchell home since
... that Gladys was a very good ...
known, called by the people, testified that at the time she testified
she lived about a block away from the Mitchell; that ... she
was a tenant of the defendant and rented the upstairs flat from
January 1st to September 1st, 1905; that while she lived at the
Mitchell home she ... in the basement; that she was then asked,
"Did Gladys ...
room; then I moved but they have made up two rooms down there since
while I was living there"; ... "While you lived there do you personally
know who slept in the basement of the Mitchell home?" A. "Yes, sir."
She then stated that she did not know Gladys, the prosecutrix,
"last year"; that she met Gladys when she came back "this year".

She was then asked, "but you didn't see her at any time when she worked at Mitchell's at all?" and she answered, "Yes, this summer I did. I saw her every day". The court then asked, "when did she come to work this summer, madam, in 1939?" The witness answered, "I believe it was in August". She further testified that her best recollection was that Gladys worked in the Mitchell home in August "of this year, 1939", and that at that time the witness lived upstairs. On cross-examination she was asked if she knew how Miss Kittenmeyer came to come back in August, 1939. She answered, "well, all I know is that he went after her and brought her there"; that she saw him bring her there; that he brought her there first on a Sunday and that she spent the day there. She was then asked if she would be surprised to know that the warrant was sworn out on July 15, 1939. She replied that she did not know anything about that. She was then asked, "But you are positive she came back there and worked one month in August?" and she replied, "I say she came back this summer and I thought it was August". She also reasserted that Mr. Mitchell brought her back. She further testified that Gladys had a suit case when she came back. Isabel Smeedin, called by the People, testified that she lived close to the Mitchell home and that she did not see her (prosecutrix) come to or go from the Mitchell home with men. Mrs. Thomas Wallace testified that she lived in Freeport, Illinois, and was a sister of Gladys, and that she was taking care of Gladys's baby. The defense then recalled Gladys to the stand for further cross-examination. She was asked questions of an impeaching nature in an endeavor to show that on the preliminary hearing before the Justice of the Peace she had testified that she went out with a boy named Lou. On the trial she stated that she did so, but that Lou's sister was always present. She further testified that after the baby was born and while the baby was in the Cradle at Evanston, she came out and asked Mitchell for support for the child. She was then asked, "Is that the last time that you were out there?"

Q. Now, you then asked, "but you didn't see her at any time when she worked at Mitchell's as a girl?" and she answered, "Yes, this summer I did. I saw her every day." The court then asked, "When did she come to work this summer, mother, in 1937?" The witness answered, "I believe it was in August." The witness testified that her last recollection was that Gladys worked in the Mitchell home in August "of this year, 1937", and that at that time she almost never visited. On cross-examination she was asked if she knew how Gladys' testimony came to come back in August, 1937. She answered, "Well, all I know is that he went after her and brought her there"; that she saw him bring her there; that he brought her there first on a Sunday and that she spent the day there. She was then asked if she would be surprised to know that you visited her there and on July 11, 1937. She replied that she did not know anything about that. She was then asked, "but you are positive she came back there and worked for you in August?" and she replied, "I am not sure about this summer and I thought it was August". She also testified that Mr. Mitchell wanted her body. The witness testified that she had a visit once when she came home. Rachel Cassidin, called by the State, testified that she lived since in the Mitchell home and that she did not see her (prosecutrix) come to or go from the Mitchell home with her. Mrs. Thomas also testified that she lived in Chicago, Illinois, and was a sister of Gladys, and that she was taking care of Gladys's body. The balance then recalled Gladys to the stand for further cross-examination. She was asked questions of an impeaching nature in an endeavor to show that on the preliminary hearing before the Justice of the Peace she had testified that she went out with a boy named Lou. On the trial she stated that she did not, but that Lou's sister was always present. The witness testified that after the body was born and while the body was in the custody of Evanston, she came out and asked Mitchell for support for the child. She was then asked, "is that the last time that you were out there?"

and she answered, "No, he came in to my girl friend's and got me then, bag and baggage."

The defendant, who is 40 years old, testified in his own behalf that he was purchasing the property where they lived; that he had been twice married; that he was divorced from his first wife when the two older boys were two or three years old; that about 8 years before the trial, he remarried; that twins were born of the second marriage; that the twins' "mother is a nervous sort of woman and the children got on her nerves and she just walks off and after she is gone a while, she settles down and comes back. She has come back on several occasions"; that she (his wife) was in the home "one time when Miss Wittenmeyer was there staying"; that he is a railroad switchman for the Santa Fe and works different shifts; that he is on the extra board and works whenever hours are available; that Mrs. Durham worked there three weeks; that he had an advertisement in the paper for a housekeeper to take care of the four children; that prosecutrix answered by letter; that he, defendant, in turn replied to her letter; that he drove to South Beloit and had an interview with prosecutrix on July 5, 1938; that after a conference he retained her; that she (Gladys) told him that she was married and that her husband was in the Navy; that the statement that her husband was in the Navy was repeated in the presence of others after they arrived at his home. He denied that he told any one that Gladys was his cousin, or that he heard any one say that she was his cousin. He further testified that Gladys came there on June 5, 1938, and Mrs. Durham left on June 13, 1938; that in the presence of Mrs. Durham and the boys he frequently reprimanded Gladys for her conduct with respect to the boys; that Gladys would sit on Charles Junior's lap and put her arms around him; that he cautioned her to stay away from the boys; that Gladys remained there from June 5, 1938, to September 18, 1938; that the cause of her leaving was misconduct with the boys; that he saw familiarity between Charles Junior and

and she answered, "No, he came in to my friend's and got me then, bag and baggage."

The defendant, who is 27 years old, testified in his own

behalf that he was purchasing the property where they lived; that he had been twice married; that he was divorced from his first wife

when the two other boys were two or three years old; that about 2

years before the trial, he remembered that some word about of the

second marriage; that the woman, "mother is a nervous sort of woman and the children got on her nerves and she just went off and after

she is gone a while, she settles down and comes back. The boy

came back on several occasions; that she (his wife) was in the house "one time when this defendant was away traveling"; that he is a

married woman for the "house is and some different matter; that he is on the other hand and some money he has the defendant;

that Mrs. Arthur asked their three children; that he had an interview

in the paper for a housekeeper to take care of the house

children; that defendant answered at first; that he, defendant,

is not married to her father; that he knows no woman named and has an interview with defendant on July 5, 1935; that after a conversation

he retained her; that she (Gladys) told him that she was married and that she wanted to be in the house; that the defendant told her father

and in the Navy was reported in the presence of others after that

arrived at his house. He denied that he told any one that Gladys

was his cousin, or that he heard any one say that she was his cousin. He further testified that Gladys came there on June 2, 1935, and

Mrs. Arthur left on June 11, 1935; that in the presence of her

father and the boys he personally introduced Gladys to her mother and the boys; that Gladys would sit on Arthur's lap and put her arms around him; that he cautioned her to stay away

from the boys; that Gladys remained there from June 2, 1935, to

September 11, 1935; that the father of her father was deceased

and the wife; that he has familiarity between Arthur's father and

Gladys 13 or 14 times, and on each occasion he reprimanded her. The misconduct consisted of her sitting on Charles's lap. He stated that he also saw Gladys lie on the bed alongside of the younger boy, William, and put her arm around him. He further testified that he did not at any time have intercourse with the prosecutrix and that he did not know that he was charged with being the father of her child until June, 1939; that in June, 1939, he was asleep and that she walked in and woke him up and asked him to go "downtown and sign adoption papers for her baby. That is the first time the baby was mentioned;" that he told her he had nothing to do with the baby; that "she carried on like she did on the witness stand and I went back to sleep and she left"; that he did not go to her and bring her to his house in June, 1939, and did not bring her there in the year 1939; that he visited her at the hospital four times and paid her money on each occasion on account of her salary; that when he visited her at the hospital she did not accuse him of being the father of her child. He denied that he at any time attempted to climb into bed with the prosecutrix. He further testified that the boys slept in the basement "a lot of the summer, 1939." He was asked, "How about 1938?" and he answered, "Here is a receipt from the cement man who finished the walls in the basement, dated October 19, 1938." He also testified that he saw Gladys hugging and kissing Charles Junior, and that he saw the same conduct by Gladys as to the younger boy William; that she frequently went into Chicago in the evening and did not return until 2 or 3 o'clock in the morning; that in the morning at breakfast in the presence of the boys, she narrated her experiences of the night before; that he reprimanded her for so doing and told her to desist; that he first knew that he was accused of being the father of the child about the middle of June, 1939; that while she worked for him, she asked for advances of cash in order to go into town, which he gave to her; that he agreed to pay her \$7.00 a week. On cross-examination^{he} was asked whether,

Chicago is or is not, and on some occasion he was present there. The
allegation consisted of her visiting on January 1st, 1933, the subject
that he also saw Chicago in the last apartment of the apartment
building, and was not the subject. He further testified that he
did not at any time have intercourse with the subject and that
he did not know that he was charged with being the father of her
child until June, 1933; that in June, 1933, he was charged and that
she walked in and woke him up and said to him "I have a secret and
sign abortion papers for her baby. That is the first time the baby
was mentioned;" that he told her he had nothing to do with the baby;
that "she walked on like she did on her witness stand and I went
back to sleep and was later"; that he did not go to her and bring
her to his home in June, 1933, and did not bring her there in the
year 1933; that he visited her at the apartment four times and paid
her money on each occasion on account of her salary; that when he
visited her at the apartment she did not accuse him of being the
father of her child. He further testified that at any time attempted to
elude into bed with the prosecutrix. He further testified that the
boys slept in the basement in the apartment, 1933. He was
asked, "How many times did you see the subject, when he was not from
the apartment and he testified the only time he saw the subject, being together
in, 1933." He also testified that he saw Chicago during and during
Charles J. Jones, and that he saw the same conduct by Chicago as to
the younger boy William; that she frequently went into Chicago in
the evening and did not return until 2 or 3 o'clock in the morning;
that in the evening at breakfast in the presence of the boys, she
narrated her experience of the night before; that he represented
her for as doing and told her to do that; that he lived with her
he was accused of being the father of the child about the middle of
June, 1933; that while she worked for him, she asked for advances of
cash in order to go into town, which he gave to her; that he agreed
to pay her \$10.00 a week. He was asked, "Did you ever see Chicago
de

when he hired a housekeeper, he always asked for a picture. He answered that he never requested a picture from any girl. He denied that he requested her to send him a picture of herself; that on the occasions he visited her in the hospital he gave her some money; that he had not given her any money from the time she left his home on September 18, 1938, until he visited her in the hospital in the spring of 1939; that when she left his home he gave her \$10.35; that she left her sister's address as her mailing address; that he did not mail her any money; that he did not have any money to spare. On further cross-examination as to whether he had asked her to send him a picture he answered, "I don't recall asking for her picture". He was asked, "would you say you did not ask for her picture?" He said, "No, sir". He finally stated that he was pretty sure he did not ask for her picture. He also denied that he sent her. He stated that after Gladys left his home in September, 1938, she came back in October, 1938, and asked for her wages; that he told her he did not have much to spare, and that he then gave her \$2.00; that the last time he saw Gladys at the hospital was March 22, 1939, and that he saw her in the reception room; that he did not notice anything unusual about her appearance. He further testified that after the time in June when she came to his home and talked about the adoption papers, she came back again the latter part of June, 1939. He finally answered that Gladys came back about the 24th or 25th of June, 1939, and "stayed until the 15th of July". He further stated that when she returned in 1939 she stayed about half a month.

Bess Durham testified that she was employed by the defendant as a housekeeper; that she had given notice that because of the illness of her sister she had to leave; that Gladys arrived at the home on June 5, 1938; that she, the witness, left the Mitchell home on June 13th; that Gladys told her that she was a cousin of Mr. Mitchell; that the morning after the arrival of Gladys she saw Gladys put her arms around Charles Junior, and that she also saw her sit on

when he hired a housekeeper, he always found her a stranger. He answered that he never requested a witness from any girl. He denied that he requested her to send him a witness of anything; that on the occasion he visited her in the hospital he gave her some money; that he had not given her any money from the time she left his home on September 12, 1936, until he visited her in the hospital in the spring of 1938; that when she left his home he gave her \$10.00; that she left her sister's address and was willing to come; that he did not tell her any money; that he did not have any money to spare. On further cross-examination he testified he had asked her to send him a picture he answered, "I don't usually send for her picture". He was asked, "Would you say you did not ask for her picture?" He said, "No, sir". He finally stated that he was sorry even he did not ask for her picture. He also stated that he had not. He stated that after Gladys left his home in September, 1936, she came back in October, 1936, and asked for her picture; that he told her he did not have much to spare, and that he then gave her \$2.00; that the last time he saw Gladys at the hospital was around 1937, and that he saw her in the reception ward; that he did not notice anything unusual about her appearance. He further testified that after the time in June when she came to his home and talked about the adoption papers, she came back again in the latter part of June, 1936. He finally answered that Gladys came back about the 15th or 25th of June, 1936, and stayed until the 15th of July. He further stated that when she returned in 1936 she stayed about half a month. He then testified that she was employed by the defendant as a housekeeper; that she had given notice that because of the illness of her sister she had to leave; that Gladys arrived at the home on June 8, 1936; that she, the witness, left the Alcoholic home on June 15th; that Gladys told her that she was a cousin of Mr. Mitchell; that the morning after the arrival of Gladys she saw Gladys at her home around Charles Junction, and that she also saw her at an

Charles Junior's lap; that she saw like conduct between Gladys and William Mitchell; that on the night of June 10, 1933, Gladys left home at about 9 P.M. and did not return until 1 or 2 o'clock in the morning. She also testified that Gladys said she was married to a sailor. She further testified that she, the witness, was paid \$6.00 a week and that she was paid each week. Charles E. Mitchell, Jr. testified that he was a senior in high school; that he saw Gladys the morning after her arrival at their home and that on that morning she sat on his lap, and that she kissed him good-bye as he was going to school; that like occurrences took place about 50 times, and that she conducted herself in like manner as to William; that she frequently went to Chicago after supper in the evening and did not come home until after midnight; that she kept company with a boy named Lou; that at the breakfast table she frequently recounted her experiences of the previous evening, and that his father warned her that they were not interested in her experiences and to desist. William Mitchell testified in a similar vein to his brother. Gladys testified on rebuttal that her weight at the time she worked for the defendant was 140 pounds and that at the time he saw her at the hospital her weight was 185 pounds; that when he saw her at the hospital it was in the day time and that the room was well lighted. The defendant, by his counsel, read into the record excerpts from a transcript of the record at the preliminary hearing. These excerpts were introduced for the purpose of impeaching the prosecutrix.

Defendant insists that the testimony of Gladys is not worthy of credence. He says her testimony is inconsistent as to the picture. She testified that she sent him a picture in response to his request. He testified that he did not request the picture. However, on cross-examination, as to the picture, he was evasive. He said he would not say that he did not ask for the picture and finally that "he was pretty sure" that he did not ask for the picture. Defendant challenges Gladys's testimony that she had intercourse

Charles Jackson's legs; that the two men were sitting on the floor and
William Mitchell; that on the night of June 14, 1935, Jackson left
home at about 7 P.M. and did not return until 1 or 2 o'clock in
the morning. She also testified that Jackson said she was married
to a sailor. She further testified that she, the witness, was paid
\$2.00 a week and that she was paid each week. Charles A. Mitchell,
Dr. testified that he was a teacher in high school; that he was
employed the morning after her arrival at their home and that on that
morning she sat on his lap, and that she kissed him frequently as he
was going to school; that this acquaintance took place about 30 days
and that she conducted herself in like manner as he testified; that
she frequently went to Chicago after school in the evening and
did not come home until about midnight; that she kept company with
a man named Ray; that in the meantime she was frequently in-
company her superiors of the previous evening, and that the father
warned her that they were not interested in her relationship and in
desert. William Mitchell testified in a similar vein to his daughter.
Charles testified on rebuttal that her belief at the time she married
for the defendant was 100 percent and that at the time he was not at
the hospital her belief was 100 percent; that when he saw her at the
hospital it was in the day time and that the room was well lighted.
The defendant, by his counsel, read into the record evidence from
a testimony at the trial of the defendant's mother. These
evidence were introduced for the purpose of impeaching the government's
testimony in that the testimony of Charles is not
worthy of credence. He says her testimony is inconsistent as to
the picture. She testified that she took him a picture in response
to his request. He testified that he did not request the picture.
However, on cross-examination, as to the picture, he was evasive.
He said he would not say that he did not ask for the picture and
finally that "he was pretty sure" that he did not ask for the picture.
Defendant's testimony Charles's testimony was not impeached.

with his commencing about June 10, 1938, and continuing until the early part of September, 1938. Defendant attacks her testimony concerning her friendship with Lou Walters. Defendant points out that she gave the name of a fictitious person as the father of her child when the child was placed in the Cradle, and that at the time the baby was born she did not name the father. He maintains that Mrs. Edema, a witness for the People, testified that she did not know Gladys during the year 1938, contrary to the testimony of Gladys that she first met her in the spring of 1939. He also calls attention to what he terms are contradictions in the testimony of Gladys that the boys were sleeping in the basement during the summer of 1938 and to various other alleged contradictions. The record does not show that Gladys stated that she talked to Mrs. Edema in 1938. She did testify that at the time she became pregnant she talked to the woman who lived upstairs. Mrs. Edema did not live upstairs at that time. She did not move into the Mitchell house until January, 1939. One of the contentions of defendant is that the prosecutrix lied when she said that one of the Mitchell boys slept in the basement. Mrs. Edema testified that the two older boys slept in the basement while she was living in the house. She further testified that during her tenancy, there were no sleeping quarters in the basement, but that two rooms were constructed there while she was living there. It will be noted that in the early part of June, 1939, the Mitchell flat was occupied by the twins, the two older Mitchell boys, Mrs. Durham and her daughter, the defendant and the prosecutrix. The apartment consisted of a living room, a dining room, a bed room, a kitchen and a sun porch. Gladys did testify that she told defendant that she was married to a sailor and that such statement was not the truth. On direct examination she testified that defendant did not call on her in the hospital. On cross-examination, however, she admitted that he did call on her. However, there are important circumstances that tend to corroborate her testimony. She testified that after she left the Mitchell home in September, 1938, on the

with his commencing about June 10, 1936, and continuing until the
early part of December, 1936. Numerous nights per week were
concerning her friendship with the witness. Numerous nights per week
and gave the name of a fictitious person as the father of her child
when the child was placed in the hospital, and that is the first time
baby was born and did not name the father. It is recalled that the
witness, a witness for the people, testified that she did not know
Mickey during the year 1936, contrary to the testimony of Mickey
that she first met her in the spring of 1936. It also will be recalled
to what he refers and contradictions in the testimony of Mickey that
the boys were sleeping in the basement during the summer of 1936
and to various other alleged contradictions. The record does not
show that Mickey stated that she talked to Mrs. Brown in 1936. She
did testify that at the time she became pregnant she talked to the
woman who lived upstairs. Yes, Brown did not live upstairs at that
time. She did not move into the Mitchell house until January, 1936.
One of the contradictions of defendant is that the witness testified that when
she said that one of the Mitchell boys slept in the basement. Mrs.
Brown testified that the two other boys slept in the basement while
she was living in the house. The witness testified that during her
tenancy, there were no sleeping quarters in the basement, but that
two rooms were converted there while she was living there. It
will be noted that in the early part of June, 1936, the Mitchell
did not occupy the house, the two other Mitchell boys, Mrs.
Brown and her daughter, the defendant and the prosecutrix. The
apartment consisted of a living room, a dining room, a bed room, a
bathroom and a kitchen. There are several other facts and circumstances
that are omitted in a section and that such statements were not
the truth. On direct examination she testified that defendant did
not tell her that in the hospital. In re-examination, however,
she testified that she did tell her. However, there are important
circumstances that tend to corroborate her testimony. She testified
that after she left the Mitchell house in September, 1936, at the

urging of her sister she returned for a day or two about a month later, at which time the then wife of the defendant was in the home. Defendant also testified that his wife had returned and was at home at the time Gladys came there in the fall of 1938. When the defendant visited her at the hospital in March, 1939, which was about six weeks before she delivered the baby, he stated that he did not know that she was pregnant. This statement seriously reflects on his credibility. He was the father of four children. It would be rather remarkable if he failed to note the changed physical appearance of Gladys at a time she was in an advanced state of pregnancy. He called on her at the hospital and must have known why she was there. He testified that he did not know that he was charged with being the father of the child until about the middle of June, 1939, at which time Gladys barged into his home while he was sleeping and asked him to sign adoption papers for the baby. However, he testified that Gladys returned to his home around the 24th or 25th of June, 1939, and remained there until July 15, 1939. His testimony in this respect corroborates the testimony of Mrs. Edema, who lived on the second floor of the Mitchell house from January to September, 1939. She stated that defendant brought Gladys to his home in 1939. She also testified that when Gladys came back there in 1939, she worked one month. We have also considered the testimony of the various witnesses concerning the actions of Gladys with respect to Charles Junior and William Mitchell. It is remarkable that the defendant, after reprimanding Gladys time and time again, nevertheless permitted her to remain there until the latter part of September, 1939, and again for two weeks in the summer of 1940, after the baby was born. The two boys testified that they were continually objecting to her attentions. The fact that she remained there for 3-1/2 months speaks strongly in behalf of the truth of her testimony. It will also be observed that although the defendant paid Mrs. Durham every week, according to

writing of her sister the defendant for a copy of the same a month
later, at which time the defendant was in the house.
Defendant also testified that his wife had returned and was at home
at the time Gladys came there in the fall of 1932. When the
defendant visited her at the hospital in March, 1933, when she
about six weeks before she delivered the baby, he stated that he
did not know that she was pregnant. This statement seriously reflects
on his credibility. He was the father of two children. It would
be rather remarkable if he failed to note the obvious physical
appearance of Gladys at a time when she was in an advanced stage of
pregnancy. He called on her at the hospital and must have known
why she was there. He testified that he did not know that he was
charged with being the father of the child until about the middle
of June, 1933, at which time Gladys began labor and gave birth to
a baby. Gladys and asked him to sign adoption papers for the baby.
However, he testified that Gladys returned to his home around the
24th or 25th of June, 1933, and remained there until July 13, 1933.
His testimony in this respect contradicts the testimony of one
Thacker, who lived on the second floor of the Mitchell house from
January to December, 1933. He stated that defendant brought
Gladys to his home in 1933. He also testified that when Gladys
came back there in 1933, she worked one month. He has also con-
firmed the testimony of the village witnesses concerning the
return of Gladys after her confinement to the Mitchell house and William Mitchell.
It is probable that the defendant, after separating Gladys from
him and time again, nevertheless permitted her to remain there until
the latter part of November, 1933, and again for two weeks in the
winter of 1933, after the baby was born. The two brief visitations
that were continuingly reported to her relatives. The fact
that she remained there for 3-4 months speaks strongly in detail
of the truth of her testimony. It will also be observed that
although the defendant paid her, between twenty cents, considering the

his own testimony, he did not pay Gladys except in dribs and drabs. She left the Mitchell home in September, 1938, and he had her address, yet he did not give her any further payments on her salary until she was in the hospital in the spring of 1939, and although he did not see fit to mail her any part of the balance he owed her, he visited her in the hospital while she was in an advanced state of pregnancy. After the baby was born she called on him. She then charged him with being the father of her child. She departed, but returned toward the end of June and remained in his home about two weeks. At the time he allowed Gladys to remain in his home for two weeks, he knew, according to his own testimony, that she was accusing him of being the father of her baby. The fact that he received her into his home after he knew she was accusing him of being the father of her baby lends strong support to her testimony. According to his testimony she left his home on July 15, 1939. It is worthy of mention that this is the day when she went before the Magistrate and swore to the complaint on which the warrant for his arrest was issued.

This case was tried before an able and experienced judge, who had an opportunity to see and hear the witnesses and to observe their demeanor. We are satisfied that the testimony of the prosecutrix has been corroborated by credible testimony and by significant circumstances. The trial judge believed the testimony of the defendant. We are of the opinion that the record shows that the People proved by a preponderance of the evidence that defendant is the father of Gladys Wittenmeyer's baby.

For the reasons stated, the judgment of the Criminal Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. CONCURS, and
DENIS W. SULLIVAN, J. DISSENTS.

his own testimony, he did not say anything about the child and the...

The fact that the child was in the hospital, that, and the fact...

admitted, yet he did not give any further testimony on that subject...

until she was in the hospital in the spring of 1933, and although...

he did not see it he well has any part of the child in his hand...

he visited her in the hospital while she was in the hospital...

of pregnancy. After the baby was born he visited her in the...

then changed him after being the father of her child. The mother...

but returned toward the end of June and remained in his home...

two weeks. At the time he always looks at her in his home for...

two weeks, he knew, according to his own testimony, that she was...

according to him of being the father of her child. The fact that he...

received her into his home after he knew she was pregnant and...

being the father of her baby looks almost certain to her testimony...

according to his testimony she was born on July 15, 1933. It...

is worthy of mention in this case is that when she went before the...

Magistrate and swore to the complaint he made the statement for his...

attest and swear.

This case was tried before the jury and testimony taken...

who had an opportunity to see and hear the witnesses and to observe...

their testimony, he testified that the testimony of the witnesses...

trial has been corroborated by credible testimony and by significant...

circumstances. The trial judge believed the testimony of the...

defendant. He was of the opinion that the record shows that the...

facts proved by a preponderance of the evidence that defendant is...

the father of the child. The court's order.

For the reasons stated, the judgment of the trial judge...

is hereby affirmed.

Witness my hand and seal of office at the City of New York...

this 15th day of July, 1933.

41204

FOREST PRESERVE REAL ESTATE IMPROVEMENT
CORPORATION, a corporation,

APPEAL FROM

Appellee.

CIRCUIT COURT

COOK COUNTY.

A. PARKIN MILLER,

Appellant.

307 I.A. 243

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On October 6, 1938, plaintiff filed a complaint in chancery in the Circuit Court of Cook County and therein alleged that it was seized and possessed of certain real estate, commonly known and described as the southeast corner of Avenue J and East 118th Street, Chicago; that on April 1, 1938, defendant and plaintiff signed and delivered a written sealed instrument whereby plaintiff promised to convey said land by warranty deed to the defendant on the payment by the latter of the sum of \$15,385.74 in installments; that the agreement provides that the time of payment shall be of the essence thereof; that the defendant failed to make payments as stipulated in the contract; that on September 15, 1938, plaintiff gave notice of intention to forfeit the contract; that on October 13, 1938, plaintiff made a declaration of forfeiture; that the contract is a cloud upon plaintiff's title, and prayed that the contract be declared null and void and that the payments made thereunder be declared forfeited to plaintiff; that the contract be declared a cloud upon the title and that the cloud be removed by a decree of the court. Defendant filed an answer and a counterclaim. This counterclaim and amended counterclaim were stricken. Defendant then filed a second amended counterclaim. In this opinion we will speak of the Forest Preserve Real Estate Corporation as plaintiff, and A. Parkin Miller, counterclaimant, as defendant. It appears that on January 9, 1937, defendant served a notice on the plaintiff that "because of your said wrongful acts I shall regard said contract as rescinded and no longer binding upon either of the parties thereto. I further notify you that the undersigned has in response of your demand for possession

ALL INFORMATION CONTAINED

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ELC. A. I 708

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

On October 8, 1935, Plaintiff filed a complaint in the Circuit Court of Cook County and therein alleged that it was seized and possessed of certain real estate, commonly known and described as the southeast corner of Section 4 and East 112th Street, Chicago; that on April 14, 1937, Defendant and Plaintiff signed and delivered a written sealed instrument whereby Plaintiff promised to convey said land by warranty deed to the Defendant on the payment by the latter of the sum of \$15,000.00 in installments; that the agreement provides that the time of payment shall be at the option of Plaintiff; that the Defendant failed to make payments as required in the contract; that on September 14, 1937, Plaintiff gave notice of intention to forfeit the contract; that on October 14, 1937, Plaintiff made a declaration of forfeiture; that the contract is a valid and binding contract; and except that the contract be modified, null and void and that the payments made thereunder be refunded to Plaintiff; that the contract be declared a void contract; the title and that the same be removed by a decree of the court.

Defendant filed an answer and a counterclaim. This counterclaim and amended counterclaim were verified. Defendant then filed a second amended counterclaim. In this petition he will seek of the court a decree that Plaintiff pay to Defendant the sum of \$15,000.00, with interest, as damages. It appears that on January 8, 1937, Defendant moved a motion for the Plaintiff that the court should set aside the judgment and that the Plaintiff should be required to pay to the Defendant the sum of \$15,000.00, with interest, as damages. The court granted the motion and the Plaintiff was required to pay to the Defendant the sum of \$15,000.00, with interest, as damages.

of the premises, abandoned the same and has placed the same at your disposal. And the undersigned hereby surrenders all claim to the possession of the said premises." Defendant in his counterclaim prays for a judgment for the aggregate of the payments on the contract of \$11,832.00. On October 3, 1930, the court entered a decree striking the second amended counterclaim and denying leave to file a third amended counterclaim. The decree also found that the material allegations of the complaint were not denied by the answer and directed that the contract between the parties be removed as a cloud on the title, and that judgment be entered against defendant for costs. Defendant prosecutes this appeal for the purpose of reviewing the decree.

The first point urged by the defendant is that having received all the payments when the contract was in arrears and having during the course of ten years' dealing between the parties never indicated that it would insist upon the strict terms of said contract and having thereby lulled defendant into a sense of security, plaintiff could not resort to the strict terms of the said contract without giving defendant notice, and allowing a reasonable time within which defendant could protect himself from the forfeiture. The second point advanced is that after payment of \$11,832.00 in installments paid over a period of six years on a contract originally for \$11,650 and increased by the vendor making improvements to \$15,385.75, "a sixteen day notice of intention to forfeit unless \$4,440.63 principal and \$1,394.16 interest were paid, was so unreasonable as to be in law no notice at all". The final point presented by defendant is that the plaintiff having repudiated the contract and repossessed itself of the real estate, the defendant by serving notice upon plaintiff of its election to rescind effected a rescission of said contract, and is entitled to recover the sums of money paid by defendant upon said contract. As these points are related one to the other, we will consider them together. Under the contract of June 18, 1925, defendant agreed

of the premises, abandoned the same and has placed the same in your
possession. And the undersigned hereby certifies all this to the
possession of the said premises. Defendant in his counterclaim
prays for a judgment for the recovery of the payments on the contract
of \$11,825.00. On October 2, 1915, the court entered a decree
setting the second amended counterclaim and denying leave to file
a third amended counterclaim. The decree also found that the
material allegations of the complaint were not denied by the answer
and directed that the contract between the parties be removed as a
cloud on the title, and that judgment be entered against defendant
for costs. Defendant protests this decree for the purpose of
reversing the same.

The first point urged by the defendant is that having
received all the payments when the contract was in effect and
having during the course of ten years' dealing between the parties
never indicated that it would insist upon the strict terms of said
contract and having thereby lulled plaintiff into a sense of
security, plaintiff could not resort to the strict terms of the
said contract without giving defendant notice, and allowing a
reasonable time within which defendant could protect himself from
the forfeiture. The second point advanced is that after payment
of \$11,825.00 in installments well over a period of six years on
a contract originally for \$11,825 and increased by the vendor
being improvements to the land, it is inequitable and unjust to require
the plaintiff to pay the balance of \$1,200 in interest and
principal, when no unreasonable time to be in the notice of plaintiff. The
final point presented by defendant is that the plaintiff having
renounced the contract and repudiated itself of the real estate,
the defendant by serving notice upon plaintiff of its election to
rescind effected a rescission of said contract, and is entitled to
recover the sum of money paid by defendant upon said contract.
As these points are related one to the other, we will consider
them together. Under the contract of June 18, 1908, defendant agreed

to pay for the real estate the sum of \$11,880.00. He was to pay \$3,833.33 on the day of the signing of the contract and \$333.00 on March 16, 1927, and \$333.00 on the 16th day of each and every month thereafter until the entire sum was fully paid, plus interest. It was provided that:

"In case of the failure of the said party of the second part [Miller] to make any of the payments, or any part thereof, or perform any of the covenants hereof on his part hereby made and entered into, this contract shall at the option of the party of the first part [plaintiff] be forfeited and determined, and the party of the second part [Miller] shall forfeit all payments made by him on this contract, and such payments shall be retained by the said party of the first part [plaintiff] in full satisfaction and as liquidated damages by it sustained, and in such event the party of the first part shall have the right to re-enter and take possession of the premises aforesaid. * * * That time of payment shall be of the essence of this contract."

It appears that on or before April 1, 1929, defendant had fallen in arrears in making the monthly installment payments and was in default under the terms of the contract; that on or about April 1, 1929, the contract of June 16, 1926, was cancelled by mutual consent and a new contract executed; that monthly payments under the new contract were reduced from \$333.00 a month to \$100.00 a month, to be paid in seventy successive monthly payments commencing on May 1, 1929; that commencing in April, 1929, defendant paid regularly under the contract until June 8, 1931, and made no payments thereafter except one payment on April 27, 1932, of \$62.83. There were no other payments made by defendant in 1932, 1933, 1934, 1935 or 1936, and he never tendered or offered to make any payments under the contract after April 27, 1932. It further appears that on September 15, 1936, plaintiff served defendant with a notice of its intention to forfeit, the last paragraph of which reads:

"You are further notified that the undersigned has at all times been ready, able and willing to perform its part of said contract, and that the undersigned is now and will be, up to and including October 1, 1936, ready, able and willing to perform the vendor's part of the contract."

It also appears that on October 13, 1936, plaintiff served defendant with a declaration of forfeiture, and that when the notice of intention to declare forfeiture under the contract was served upon defendant, he did not complain about the length of time given him to

to pay for the total estimate the sum of \$11,800.00. He was to pay \$7,000.00 on the day of the signing of the contract and \$4,800.00 on March 14, 1947, and \$200.00 on the 15th day of each and every month thereafter until completion of the work. This was the agreement.

1867 1868 1869 1870 1871 1872 1873 1874 1875 1876 1877 1878 1879 1880 1881 1882 1883 1884 1885 1886 1887 1888 1889 1890 1891 1892 1893 1894 1895 1896 1897 1898 1899 1900 1901 1902 1903 1904 1905 1906 1907 1908 1909 1910 1911 1912 1913 1914 1915 1916 1917 1918 1919 1920 1921 1922 1923 1924 1925 1926 1927 1928 1929 1930 1931 1932 1933 1934 1935 1936 1937 1938 1939 1940 1941 1942 1943 1944 1945 1946 1947 1948 1949 1950 1951 1952 1953 1954 1955 1956 1957 1958 1959 1960 1961 1962 1963 1964 1965 1966 1967 1968 1969 1970 1971 1972 1973 1974 1975 1976 1977 1978 1979 1980 1981 1982 1983 1984 1985 1986 1987 1988 1989 1990 1991 1992 1993 1994 1995 1996 1997 1998 1999 2000 2001 2002 2003 2004 2005 2006 2007 2008 2009 2010 2011 2012 2013 2014 2015 2016 2017 2018 2019 2020 2021 2022 2023 2024 2025 2026 2027 2028 2029 2030 2031 2032 2033 2034 2035 2036 2037 2038 2039 2040 2041 2042 2043 2044 2045 2046 2047 2048 2049 2050 2051 2052 2053 2054 2055 2056 2057 2058 2059 2060 2061 2062 2063 2064 2065 2066 2067 2068 2069 2070 2071 2072 2073 2074 2075 2076 2077 2078 2079 2080 2081 2082 2083 2084 2085 2086 2087 2088 2089 2090 2091 2092 2093 2094 2095 2096 2097 2098 2099 2100 2101 2102 2103 2104 2105 2106 2107 2108 2109 2110 2111 2112 2113 2114 2115 2116 2117 2118 2119 2120 2121 2122 2123 2124 2125 2126 2127 2128 2129 2130 2131 2132 2133 2134 2135 2136 2137 2138 2139 2140 2141 2142 2143 2144 2145 2146 2147 2148 2149 2150 2151 2152 2153 2154 2155 2156 2157 2158 2159 2160 2161 2162 2163 2164 2165 2166 2167 2168 2169 2170 2171 2172 2173 2174 2175 2176 2177 2178 2179 2180 2181 2182 2183 2184 2185 2186 2187 2188 2189 2190 2191 2192 2193 2194 2195 2196 2197 2198 2199 2200 2201 2202 2203 2204 2205 2206 2207 2208 2209 2210 2211 2212 2213 2214 2215 2216 2217 2218 2219 2220 2221 2222 2223 2224 2225 2226 2227 2228 2229 2230 2231 2232 2233 2234 2235 2236 2237 2238 2239 2240 2241 2242 2243 2244 2245 2246 2247 2248 2249 2250 2251 2252 2253 2254 2255 2256 2257 2258 2259 2260 2261 2262 2263 2264 2265 2266 2267 2268 2269 2270 2271 2272 2273 2274 2275 2276 2277 2278 2279 2280 2281 2282 2283 2284 2285 2286 2287 2288 2289 2290 2291 2292 2293 2294 2295 2296 2297 2298 2299 2300 2301 2302 2303 2304 2305 2306 2307 2308 2309 2310 2311 2312 2313 2314 2315 2316 2317 2318 2319 2320 2321 2322 2323 2324 2325 2326 2327 2328 2329 2330 2331 2332 2333 2334 2335 2336 2337 2338 2339 2340 2341 2342 2343 2344 2345 2346 2347 2348 2349 2350 2351 2352 2353 2354 2355 2356 2357 2358 2359 2360 2361 2362 2363 2364 2365 2366 2367 2368 2369 2370 2371 2372 2373 2374 2375 2376 2377 2378 2379 2380 2381 2382 2383 2384 2385 2386 2387 2388 2389 2390 2391 2392 2393 2394 2395 2396 2397 2398 2399 2400 2401 2402 2403 2404 2405 2406 2407 2408 2409 2410 2411 2412 2413 2414 2415 2416 2417 2418 2419 2420 2421 2422 2423 2424 2425 2426 2427 2428 2429 2430 2431 2432 2433 2434 2435 2436 2437 2438 2439 2440 2441 2442 2443 2444 2445 2446 2447 2448 2449 2450 2451 2452 2453 2454 2455 2456 2457 2458 2459 2460 2461 2462 2463 2464 2465 2466 2467 2468 2469 2470 2471 2472 2473 2474 2475 2476 2477 2478 2479 2480 2481 2482 2483 2484 2485 2486 2487 2488 2489 2490 2491 2492 2493 2494 2495 2496 2497 2498 2499 2500 2501 2502 2503 2504 2505 2506 2507 2508 2509 2510 2511 2512 2513 2514 2515 2516 2517 2518 2519 2520 2521 2522 2523 2524 2525 2526 2527 2528 2529 2530 2531 2532 2533 2534 2535 2536 2537 2538 2539 2540 2541 2542 2543 2544 2545 2546 2547 2548 2549 2550 2551 2552 2553 2554 2555 2556 2557 2558 2559 2560 2561 2562 2563 2564 2565 2566 2567 2568 2569 2570 2571 2572 2573 2574 2575 2576 2577 2578 2579 2580 2581 2582 2583 2584 2585 2586 2587 2588 2589 2590 2591 2592 2593 2594 2595 2596 2597 2598 2599 2600 2601 2602 2603 2604 2605 2606 2607 2608 2609 2610 2611 2612 2613 2614 2615 2616 2617 2618 2619 2620 2621 2622 2623 2624 2625 2626 2627 2628 2629 2630 2631 2632 2633 2634 2635 2636 2637 2638 2639 2640 2641 2642 2643 2644 2645 2646 2647 2648 2649 2650 2651 2652 2653 2654 2655 2656 2657 2658 2659 2660 2661 2662 2663 2664 2665 2666 2667 2668 2669 2670 2671 2672 2673 2674 2675 2676 2677 2678 2679 2680 2681 2682 2683 2684 2685

[illegible]

It appears that on before April 1, 1968, defendant had been in

in accordance with the provisions of the contract; that on or about April 1,

and a new contract executed; that monthly payments under the new contract were reduced from \$100.00 a month to \$100.00 a month, as paid in seventy successive monthly payments commencing on May 1, 1934.

payments made by defendant in 1984, 1985, 1986, 1987, 1988, 1989, 1990 or 1991, and no except one payment on April 27, 1991, of \$28,500. There were no other The contract until June 2, 1991, and made no payments thereafter

14-00000

the last person to whom I spoke

10-10-50

[illegible]

protect himself. The complaint shows that he made no objections at the time the notice of intention to declare a forfeiture was served on him, or at any other time prior to the actual declaration of the forfeiture. The complaint also shows that between the time the notice of the intention to declare a forfeiture was served upon him and the time the declaration of forfeiture was served upon him, no payments were made or tendered; that defendant neither offered nor tendered any payment under the contract from the time the notice of intention to declare a forfeiture was served upon him up to and including the time of his filing his second amended counterclaim, or for that matter up to the present time. In Lang v. Hadenberg, 377 Ill. 368, the court said:

"If a contract calls for successive acts, first by one party and then by the other, there is no breach by one if the precedent act has not been performed by the other. * * * Even though there were force in the argument of counsel that defendants in error by their action had suspended or postponed temporarily the right to insist upon a forfeiture, the giving of the definite and specific notice of April 13, 1914, of defendants in error's intention to declare the forfeiture furnished the proper basis for thereafter forfeiting the contracts. Monson v. Bragdon, 159 Ill. 61; Watson v. White, 153 id. 364. Counsel for plaintiff in error further argue that the result of the decrees is that a court of equity is lending its aid to enforce the forfeiture of the \$1000 earnest money. Undoubtedly, under the authorities, equity will not declare or enforce a forfeiture where it is harsh or inequitable to do so, (Tarr v. Stearns, 264 Ill. 110, and cited cases,) but all the authorities recognize that competent parties may make a contract as to penalties and forfeitures, and that courts of equity, as well as courts of law, will recognize the rights of the parties as to such penalties or forfeitures. Here a court of equity is not enforcing a forfeiture. The decrees simply hold that the defendants in error rightly declared a forfeiture under the contracts."

In the instant case, the power of the court is not being used to enforce a forfeiture. Rather, the Chancellor declared, in effect, that the defendant could not recover the payments he had made because the plaintiff rightly declared a forfeiture. The position taken by defendant is that the plaintiff having repudiated the contract and repossessed itself of the real estate, defendant had a right to rescind the contract. We are of the opinion that plaintiff had the right to forfeit the contract. It follows that the defendant has no right to recover the payments made under the contract.

For the reasons stated, the decree of the Circuit Court of Cook County is affirmed.

DECREE AFFIRMED.

HEBEL, F.J. CONOURS and OWEN E. SULLIVAN, J. DISSENTS.

For that matter as to the present time, I have no recollection, but including the time of his killing his second married woman, I do not intend to declare a false statement was made as to the intention to declare a false statement under the contract from the time the action of divorce was made or renewed; that defendant neither intended nor and the declaration of defendant was correct when said, no notice of the intention to declare a false statement was served upon him before the time the complaint was made between the time the false statement was made or renewed.

[illegible]

THE COURT OF THE COUNTY OF THE STATE OF NEW YORK, in and for the County of New York, do hereby certify that the within and foregoing is a true and correct copy of the original thereof, as the same appears from the records of the said Court, and is signed by the Clerk of the said Court, in and for the County of New York, at the City of New York, this 1st day of January, 1901.

41854

GUY V. LEHMAN, Plaintiff (Petitioner),

APPEAL FROM

v.

Defendants.

SUPERIOR COURT

JAMES A. HANNAH and ARCHIE WALKER,
Defendants (Respondents),

COOK COUNTY.

Appellants.

307 I.A. 244

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On March 30, 1939, Guy V. Lehman, Harry Klinke, Joseph W. Murphy and Louis A. Dwyer filed a two count complaint in the Superior Court of Cook County against James A. Hannah, Archie Walker, E. L. Christopher and Jewel Tea Co., Inc. The first count averred that on December 18, 1938, Guy V. Lehman was driving his automobile in a northerly direction upon Ashland Avenue at or near West 38th Street in Chicago, and that the other plaintiffs were occupants of the automobile; that all of them were in the exercise of ordinary care for their own safety and for the safety of the automobile; and that because of various acts of negligence on the part of defendants the automobile was damaged and plaintiffs suffered injuries. The second count charged the defendants with wilful and wanton misconduct. Issue was joined. Before the trial began, plaintiffs dismissed the case as to the defendants Jewel Tea Co., Inc., and E. L. Christopher, and also withdrew the second count. The trial lasted a week. At the close of the plaintiffs' case and again at the close of all the evidence, the court denied the motion of defendants for a directed verdict. The jury returned four verdicts each finding the defendants guilty and assessing damages for Guy V. Lehman in the sum of \$6,500, for Harry Klinke in the sum of \$50, for Louis A. Dwyer in the sum of \$8,000 and for Joseph W. Murphy in the sum of \$500. On the day the verdicts were returned the court entered judgment thereon. In due time the defendants filed four motions for judgment notwithstanding the verdicts, one for each separate plaintiff. Defendants also filed a motion to set aside the verdicts and to grant a new trial. The court entered an order denying defendants' motion for judgment not-

WILLIAM H. HARRIS

WILLIAM H. HARRIS

WILLIAM H. HARRIS

307 L.A. 244

THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES.

ON motion of JAMES H. HARRIS, Plaintiff, vs. JAMES H. HARRIS, Defendant.

That the said James H. Harris, Plaintiff, is the owner of a certain automobile, to-wit:

A certain automobile, make and model as shown on the title, and owned by James H. Harris, Plaintiff, of the County of Los Angeles, State of California.

That the said James H. Harris, Plaintiff, is the owner of a certain automobile, to-wit:

A certain automobile, make and model as shown on the title, and owned by James H. Harris, Plaintiff, of the County of Los Angeles, State of California.

That the said James H. Harris, Plaintiff, is the owner of a certain automobile, to-wit:

A certain automobile, make and model as shown on the title, and owned by James H. Harris, Plaintiff, of the County of Los Angeles, State of California.

That the said James H. Harris, Plaintiff, is the owner of a certain automobile, to-wit:

A certain automobile, make and model as shown on the title, and owned by James H. Harris, Plaintiff, of the County of Los Angeles, State of California.

That the said James H. Harris, Plaintiff, is the owner of a certain automobile, to-wit:

A certain automobile, make and model as shown on the title, and owned by James H. Harris, Plaintiff, of the County of Los Angeles, State of California.

That the said James H. Harris, Plaintiff, is the owner of a certain automobile, to-wit:

A certain automobile, make and model as shown on the title, and owned by James H. Harris, Plaintiff, of the County of Los Angeles, State of California.

That the said James H. Harris, Plaintiff, is the owner of a certain automobile, to-wit:

A certain automobile, make and model as shown on the title, and owned by James H. Harris, Plaintiff, of the County of Los Angeles, State of California.

That the said James H. Harris, Plaintiff, is the owner of a certain automobile, to-wit:

A certain automobile, make and model as shown on the title, and owned by James H. Harris, Plaintiff, of the County of Los Angeles, State of California.

That the said James H. Harris, Plaintiff, is the owner of a certain automobile, to-wit:

A certain automobile, make and model as shown on the title, and owned by James H. Harris, Plaintiff, of the County of Los Angeles, State of California.

That the said James H. Harris, Plaintiff, is the owner of a certain automobile, to-wit:

A certain automobile, make and model as shown on the title, and owned by James H. Harris, Plaintiff, of the County of Los Angeles, State of California.

That the said James H. Harris, Plaintiff, is the owner of a certain automobile, to-wit:

A certain automobile, make and model as shown on the title, and owned by James H. Harris, Plaintiff, of the County of Los Angeles, State of California.

That the said James H. Harris, Plaintiff, is the owner of a certain automobile, to-wit:

A certain automobile, make and model as shown on the title, and owned by James H. Harris, Plaintiff, of the County of Los Angeles, State of California.

That the said James H. Harris, Plaintiff, is the owner of a certain automobile, to-wit:

A certain automobile, make and model as shown on the title, and owned by James H. Harris, Plaintiff, of the County of Los Angeles, State of California.

withstanding the verdicts as to all plaintiffs and overruled the motion of defendants for a new trial as to Dryer, Murphy and Klink. The court granted a new trial as to the claim of plaintiff Guy V. Lehman. The latter filed a petition for leave to appeal from the order granting the new trial, which we allowed.

The instant petition is filed under a provision of Section 77 of the Civil Practice Act, (Par. 501, Ch. 110, Ill. Rev. Stat. 1939) which reads: "An order granting a new trial shall be deemed to be a final order, but no appeal may be taken therefrom, except on leave granted by the reviewing court, or by a judge thereof in vacation within thirty days after the entry of the order, on motion and notice to adverse parties." The provision is designed to promote justice and to prevent a verdict warranted by the record and justified by the evidence, from being set aside and lost to the party who was fairly entitled thereto, and such litigant forced to undergo the hazard of another trial with the further incidents of delay and expense. (Lettau v. Retail Hardware Mutual Fire Ins. Co. 385 Ill. App. 394.)

In order to determine whether there was an abuse of discretion in the granting of the new trial, we have carefully read the testimony of the witnesses. On December 15, 1938, plaintiff was employed as a linotype operator at Goldblatt Brothers printing plant located at Pershing Road and Wolcott Street, Chicago, and Lewis Dryer, Harry Klink and Joseph Murphy were also employed in the same plant as linotype operators. Their hours of work were from 8 P. M. to 2:30 A. M. They all lived on the north side of Chicago. Lehman owned a two door 1938 Chevrolet Coach. Plaintiff and his three fellow workers were returning home from work shortly after 2:30 A. M. Plaintiff was driving and Dryer was sitting alongside of him in the front seat. Klink sat on the rear seat behind plaintiff and Murphy sat on the rear seat behind Dryer. Ashland Avenue is a north and south highway in Chicago. Between 29th and 35th Streets, the east

affirming the veracity of the statements made by the witness and granting the new trial, which was allowed.

The instant motion is filed under a provision of Section 73 of the Civil Practice Act, (Sec. 73, Civ. Prac. Act, 1938) which reads: "An order granting a new trial shall be deemed to be a final order, but no appeal may be taken therefrom, except on leave granted by the reviewing court, or by a judge thereof in vacation within thirty days after the entry of the order, or within and notice to adverse parties." The provision is intended to

prevent parties and to prevent a verdict rendered by the jury and questioned by the court, from being set aside and lost to the party who has fairly entitled himself, and such further proof as undergoes the burden of proof at such trial with the burden of proof of the party.

In order to ascertain whether there was an abuse of discretion in the granting of the new trial, we have carefully read the testimony of the witness, in December 1938, Plaintiff was employed as a typewriter operator at Bellini Brothers Typewriter Company, located at 173rd Street and 18th Avenue, Chicago, and Leslie Meyer, Harry Kline and Joseph Murphy were also employed in the same plant as typewriter operators. Their hours of work were from 8 A. M. to 5:30 P. M. They all lived on the north side of Chicago. Plaintiff owned a two door 1938 Chevrolet Coach. Plaintiff and his three other brothers were residing here from about 1935 to 1938 P. M.

Plaintiff was driving and Meyer was sitting alongside of him in the front seat. Kline sat on the rear seat behind Plaintiff and Murphy sat on the rear seat behind Meyer. Plaintiff was a north and south driver in Chicago. Between 1935 and 1938, the road

and west streets do not run through, but stop at the west side of Ashland Avenue. The collision out of which the action arose occurred on Ashland Avenue just opposite where 38th Street intersects from the west. At that point Ashland Avenue is 70 feet wide from curb to curb, with an unusual subdivision of traffic lanes. The space between the west curb and safety island for southbound cars at 38th Street is 35 feet, all of which space is for southbound traffic. The safety island is 5 feet wide, then there is a space of 8 feet between the island and the southbound street car tracks. The 4 tracks occupy a space of 15 feet 4 inches, including the space between the north and south street car lanes. Then there is a space of 13 feet 3 inches between the northbound tracks and the east curb. At the time Ashland Avenue was widened by the city, the street car tracks were not moved to the center of the street. As a consequence, the southbound traffic in that area has more lanes and more freedom of movement than the northbound traffic. Plaintiff drove the car east on Pershing Road to Ashland Avenue, where he turned north. On Ashland Avenue he drove into the space between the curb and the northbound street car tracks. When he turned into Ashland Avenue there was no traffic ahead of him, but when he passed 38th Street he observed a truck in the car tracks proceeding north about half a block ahead of him. At that time plaintiff was driving between 30 and 35 miles per hour and the truck was traveling between 15 and 18 miles per hour. The truck continued in the car tracks and Lehman continued to drive between the curb and the car tracks, and when he was within 20 feet of the rear of the truck, which was a combined tractor and trailer, the trailer being approximately 31 feet in length and the tractor part about 11 feet in length, he sounded his horn and flashed his lights from dim to bright and back to dim again as he was about to pass the truck. As he reached immediately beside the tractor, the truck turned to the right and struck Lehman's automobile on the left side. The blow caused damage beginning at the

and west streets at the west side of
Indiana Avenue. The collision was at about the same place
on Indiana Avenue just opposite where the other accident took
place. At that point Indiana Avenue is 70 feet wide from curb
to curb, with an unusual subdivision of traffic lanes. The space
between the west curb and center line is 20 feet wide and is
street is 25 feet, all of which space is for automobile traffic.
The center line is 5 feet wide, then there is a space of 5 feet
between the center line and the southbound street car tracks. The
tracks occupy a space of 15 feet 6 inches, including the space
between the north and south street car tracks. Then there is a space
of 15 feet 6 inches between the northbound tracks and the west curb.
At the time Indiana Avenue was widened by the city, the street car
tracks were not moved to the center of the street. As a consequence,
the southbound traffic in that area has some lanes and some tracks
4 feet from the southbound tracks. This is the case on
east on Westinghouse Road to Indiana Avenue, where he turned north. On
Indiana Avenue he drove into the space between the curb and the
northbound street car tracks. When he turned into Indiana Avenue
there was no traffic ahead of him, but when he passed 35th Street
he observed a truck in the east tracks proceeding north about half
a block ahead of him. At that time Plaintiff was driving between
30 and 35 miles per hour and the truck was traveling between 15 and
18 miles per hour. The truck continued in the east tracks and when he
continued to drive between the curb and the east tracks, and when he
was within 20 feet of the rear of the truck, which was a loaded
tractor and trailer, the trailer being approximately 11 feet in
length and the tractor part about 11 feet in length, he sounded his
horn and flashed his lights from him to bring and look to him again
as he was about to pass the truck. As he passed immediately behind
the tractor, the truck swung to the right and struck Deanna's auto-
mobile on the left side. The blow caused damage beginning at the

left front wheel, then the rear part of the left front fender, then the left door, including breaking the handle, and the left rear fender was badly crushed and the wheel damaged. The car went out of control and over the curb and into the corner of a fence at the northeast corner of what would have been 36th Street had the street continued through at the east side of Ashland Avenue. The point of contact of the truck and the automobile was almost at the center of a driveway opposite 36th Street. A plat received in evidence shows that the space east of the curb on Ashland Avenue opposite to where 36th Street intersects with Ashland Avenue on the west, runs for a distance of perhaps 150 feet from the building line to a "dead end" and is marked "unpaved". The map does not indicate whether this is a public or a private street. There are two railroad switch tracks in this space, one on the north side and the other on the south side. Between the switch tracks is a space, which from a photograph received in evidence, is used for the purpose of parking trucks. We assume that some of these trucks also haul freight to and from the railroad cars spotted on such tracks. There is a driveway which gives access from Ashland Avenue to this unpaved dead end space, which driveway extends in an easterly direction from Ashland Avenue. Witness Klinke marked a photograph which shows that the point of contact of the truck and automobile was opposite the center of the driveway. This point is about 35 feet from the corner of the fence where plaintiff's automobile finally stopped. Lehman, Murphy and Klinke stated that no signal of an intention to turn was given from the truck. The impact fractured the right knee of Lehman, breaking the patella into several pieces so that a one half inch separation of the knee cap could be felt before the operation to his knee. The operation, under anaesthesia, was performed by an orthopedic surgeon at the County Hospital, by cutting open the knee about 7 inches, which disclosed that the upper half of the patella was in one piece, then

left front wheel, then the rear wheel of the left front fender, then the left door, including passing the handle, and the left rear fender was badly scratched and the wheel scratched. The car went out of control and over the curb and into the corner of a fence at the northeast corner of what would have been 38th Street and the street continued through at the west side of Ashland Avenue. The point of contact of the truck and the automobile was about at the center of a driveway opposite 38th Street. A flat tire was in evidence showing that the space west of the curb on Ashland Avenue was used as a "dead end" and is termed "unimproved". The car does not indicate whether this is a public or a private street. There are two railroad tracks between 38th Street and the next street and the upper on the north side. Between the railroad tracks is a space, which from a photograph received in evidence, is used for the purpose of parking trucks. It appears that some at times trucks also have lighting to and from the railroad have erected on them tracks. There is a driveway which gives access from Ashland Avenue to this subject dead end street, which driveway extends in an easterly direction from Ashland Avenue. Witness Kline showed a photograph which shows that the point of contact of the truck and automobile was opposite the center of the driveway. This point is about 25 feet from the corner of the fence where Plaintiff's automobile finally stopped. Lehman, Murphy and Kline stated that no signal of an intention to turn was given from the truck. The witness traversed the right knee of Lehman, passing the pedal into several places so that a one half inch separation of the knee was made he tells before the operation to his knee. The operation, which was described, was performed by an individual sitting at the front of the truck, by cutting over the knee about 7 inches, which showed that the upper half of the pedal was in one piece, then

there was a one half inch separation with the lower half being in several fragments. The soft tissue was sewed together and heavy silk put around the broken bones. Four months later X-rays showed that the fragments were held together by fibrous tissue and not bony healing, which condition is permanent. At the time of the trial, plaintiff's right knee was three quarters of an inch larger than his left, his right thigh was smaller than his left, he had a 35 degree less bending in his right knee and a 90 percent permanent disability. He limped and suffered pain, particularly in cold weather, and could not do his work as before, which work required that he sit with his legs under a linotype machine on a chair 2-1/2 inches lower than a normal chair. Plaintiff also sustained a cut in the forehead in which 7 sutures were taken, and a cut under the chin which required 3 stitches. He remained in the hospital from December 15, 1938, to January 22, 1939, during which time his right leg was in a cast, and after his return home he was in bed for about 10 days. He was up with the aid of a crutch for a week and used a cane for the following three months. He returned to work on February 6, 1939. At the time of the accident, his earnings were \$61.00 per week. He had been working as a linotype operator for over 20 years, and was then 42 years of age. The testimony of plaintiff was corroborated by two of the occupants of the automobile, Murphy and Klinka. The other occupant, Dryer, had no recollection of the occurrence, as he was rendered unconscious and remained in that condition for some time. The defendant Archie Walker testified that he was an auto mechanic and that he was testing the truck on the street after having made minor repairs; that he drove as far as Damen Avenue and 39th Street, and that immediately before the occurrence he was driving the truck northward on Ashland Avenue in the northbound street car tracks, with the left wheels at the left rail and the right wheels overlapping the other rail. He stated that he intended to turn to the right, or east, in order to drive the

there was a small black rectangular sign on the front left corner in
 covered triangles. The left sign was covered by the front and heavy
 side was around the front corner. The front left corner was covered
 that the fragments were held together by fibrous tissue and was
 body handling, which condition is permanent. At the time of the
 trial, Kline's right knee was three inches above the ground and
 then his left. His right thigh was smaller than his left, he had
 a 35 degree loss bending in his right knee and a 40 percent permanent
 disability. He limped and suffered pain, particularly in cold
 weather, and could not do his work as before, which work consisted
 that he sit with his legs under a linotype machine on a chair 3-1/2
 inches lower than a normal chair. Disability also consisted a cut
 in the forehead in which 7 sutures were taken, and a scar under the
 chin which remained 2 sutures. He remained in the hospital from
 December 18, 1932, to January 27, 1933, during which time his
 right leg was in a cast, and after his return home he was in bed
 for about 10 days. He was up with the aid of a crutch for a week
 and used a cane for the following three months. He returned to
 work on February 6, 1933. At the time of the accident, his earnings
 were \$21.00 per week. He had been working as a linotype operator
 for over 20 years, and was then 45 years of age. The testimony of
 plaintiff was corroborated by one of the owners of the automobile,
 Murphy and Kline. The other defendant, Eyer, had no recollection of
 the accident, as he was rendered unconscious and remained in the
 hospital for two days. The defendant claims that plaintiff
 that he was an auto mechanic and that he was working the truck on
 the street after having made about 100 feet; that he drove on for an
 Ocean Avenue and 53rd Street, and that immediately before the
 occurrence he was driving the truck northward on Ocean Avenue in
 the northernmost street car track, with the left wheels at the left
 rail and the right wheels overlapping the other rail. He stated that
 he intended to turn to the right, or east, in order to drive the

truck into the space between the railroad tracks opposite 20th Street. He stated that when he got within 50 feet of where he intended to turn, he applied the brakes and lit the directional light, which was on the right portion of the cowl above the headlight. He first saw the glare of the lights of the automobile when they were right at his truck and the car passed on after it struck his truck, went out of control and hit a fence. He also stated that before the occurrence he turned his wheels to the right about 1-1/2 feet "to warn anybody". He said he did not see what part of the automobile came in contact with his truck and that after the impact he sat quiet until he saw no one moving in the automobile, when realizing someone might be hurt, he went over to the automobile. He further testified that the truck was a tractor and semi-trailer, about 32 feet over all, that the trailer was about 10 feet high and the tractor cab 6 feet high; that the width between the wheels of the cab was 7 feet 6 inches; that the wheels on the trailer were dual, which added an additional 8 to 10 inches on each side, so that the space between the wheels in the rear was about 30 inches more than in front as the front wheels were on a line with the inside dual tires; that the body of the trailer overlapped each wheel about 4 inches; that the front fenders were about 6 inches wide, directly over the wheels, and that the headlights were between the fender and the radiator. He stated that he did not have a mirror or anything else on the cab which would show what was coming from the rear on the right, and that the directional arrow showed only on the front and back of the signal and not on the side. He said he turned the wheels to the right as a warning to any approaching vehicles. He also testified that there were stoplights on the back of the tractor which automatically went on when he applied the brakes; that the space where he was going to park the truck was clear and that he could have turned on a 90 degree angle. James M. Jacobs testified for the defendants that he was a chauffeur for James A. Hannah, one of the

turned into the space between the railroad tracks opposite 301st Street. He stated that when he was within 50 feet of where he intended to turn, he applied the brakes and lit the directional light, which was on the right portion of the wheel about the headlight. He first saw the light of the lights of the automobile when they were about 100 feet from him and the car passed on after it struck his truck, went out of control and hit a fence. He also stated that before the occurrence he turned his wheels to the right about 15-20 feet in with anybody. He said he did not see that part of the automobile come in contact with his truck and that after the impact he did not realize until he saw no one coming in the automobile, when realizing someone might be hurt, he went over to the automobile. He further testified that the truck was a tractor and semi-trailer, about 15 feet over all, that the trailer was about 10 feet high and the tractor was 6 feet high; that the width between the wheels of the truck was 7 feet 6 inches; that the wheels on the trailer were dual, which added an additional 6 to 10 inches on each side, so that the space between the wheels in the rear was about 30 inches more than in front as the front wheels were on a line with the frame back line; that the body of the trailer overlapped each wheel about 4 inches; that the front wheels were about 5 inches wide, closely over the wheels, and that the headlights were between the front and the trailer. He stated that he did not have a mirror or anything else on the end which would show what was coming from the rear on the right, and that the directional arrow showed only on the front and back of the signal and not on the side. He said he turned the wheels to the right as a warning to any approaching vehicles. He also testified that there were headlights on the back of the tractor which automatically went on when he pulled the back; that the truck was he was going to park the truck was clear and that he could have turned on a 90 degree angle. James M. Jacobs testified for the defendant that he saw a Chevrolet car about 15 feet, one of the

defendants; that he was working on the shift starting at 3:30 A. M., and that at the time of the accident he was standing at the door of a garage, the north side of which garage was located on the west side of Ashland Avenue, about 100 feet south of the unpaved space; that there were two entrances to the garage, the south entrance being about 175 feet from the place of the collision and the north entrance 135 feet away. He stated that the automobile was right alongside the truck when he first saw it, and that when it got to the front end of the truck it swerved and smashed into the corner of the fence and that he ran right down to the car; that when he first saw the truck the headlights and directional signal were lit. On cross-examination, this witness stated that he was in the north doorway; that when he first saw the truck it was about 15 feet northwest of him and that the other automobile was exactly opposite it, about 6 feet in back of the truck; that when the truck passed him it was going 8 miles an hour and was slowing down as it went by him; that the truck stopped when it was 55 or 60 feet from the driveway; that he could not see what was taking place between the left side of the automobile and the right side of the truck, and that he could not see what came in contact with what. Frank Rehner, introduced by defendants, stated that he was a chauffeur for James J. Hannah, working on the same shift starting at 3:00 A. M.; that he parked his automobile on the west side of Ashland Avenue about 50 feet south of the north door of the garage and crossed the street from west to east; that he let the truck go by him in the northbound rail of the street car tracks; that he saw a car coming from the south in the northbound rail and ran to get on the sidewalk; that the car continued in the northbound rail until within a few feet of the trailer, then swerved to the right between the curb and the tractor and past the tractor into a fence at the corner; that he did not see the truck and the automobile come together at all; that he ran down immediately and then went to get help; that he

saw the stoplight and signal light on the trailer. Upon cross-examination, this witness stated that when he was half way across the street, he saw the truck 300 to 400 feet away; that he continued to walk in a normal way and let the truck go by in front of him; that when he reached the northbound rail the truck was stopped 75 feet away from him; that he looked at the truck as it was standing in the northbound rail; that he then walked east and looked north, not while he was standing in the track, but while he was standing on the sidewalk; that he walked over to the sidewalk before he looked north; that he saw the truck down at the corner opposite 38th Street; that when he looked north the automobile was at a northwest angle from him about 15 to 20 feet and in the northbound track; that in the meantime the truck was still standing at the corner and after the automobile got up to the trailer it swerved to the right and continued in a northerly direction past the truck, maybe 5 feet from the trailer, and when it passed the trailer it went on an angle toward the sidewalk; that he did not hear any crash; that he did not see the directional light when the truck passed him but saw it for the first time after he reached the sidewalk.

The trial court in denying the motions for judgments notwithstanding the verdict, and in denying the motion for a new trial as to all of the plaintiffs, except Lehman, necessarily recognized that the plaintiffs, including Lehman, had established by a preponderance of the evidence that the defendants were guilty of negligence, as charged in the complaint. This ruling also makes it plain that the trial court was satisfied that no errors had been committed in the trial. It is apparent from the record that the reason why the court granted the motion for a new trial as to Lehman was that he felt the verdict was against the manifest weight of the evidence on the question of contributory negligence. The complaint charged defendants with having failed to comply with the requirements of Sections 85, 86 and 87 of the uniform act regulating traffic on

and the spotlight on the witness. The witness
examination, this witness stated that when he was with the
the street, he saw the truck was 400 feet away; that he continued
to walk in a normal way and that the truck was 400 feet away;
that when he reached the northbound wall the truck was stopped 75
feet away from him; that he looked at the truck as it was standing
in the northbound wall; that he then walked east and looked north,
not while he was standing in the truck, but while he was standing on
the sidewalk; that he walked east to the sidewalk where he looked
north; that he saw the truck when it was coming opposite with respect
that when he looked north the truck was 400 feet away;
from him about 15 to 20 feet and in the northbound track; that in
the meantime the truck was still standing at the corner and after
the automobile got up to the trailer it started to the right and
continued in a northerly direction past the truck, about 2 feet from
the trailer, and when it passed the trailer it went on in a circle
toward the sidewalk; that he did not see any truck; that he did
not see the directional light when the truck passed him and was it
for the first time after he reached the sidewalk.
The trial court in denying the motion for judgment not-
withstanding the verdict, and in denying the motion for a new trial
as to all of the plaintiffs, except the one, necessarily recognized
that the plaintiffs, including the one, was established by a pre-
ponderance of the evidence that the defendant was guilty of
negligence, as charged in the complaint. This ruling also makes
it plain that the trial court was satisfied that no error had been
committed in the trial. It is apparent from the record that the
court did not intend the motion for a new trial as to the
and that he was the verdict was against the plaintiff without
the evidence on the question of negligence. The defendant
admitted negligence with respect to the first plaintiff
of liability as to the other two plaintiffs.

highways, (Par. 162, 163 and 164, Ch. 95-1/2, Ill. Rev. Stat. 1939) which read:

"65. (a) No person shall turn a vehicle from a direct course upon a highway unless and until such movement can be made with reasonable safety and then only after giving a clearly audible signal by sounding the horn if any pedestrian may be affected by such movement or after giving an appropriate signal in the manner hereinafter provided in the event any other vehicle may be affected by such movement.

(b) A signal of intention to turn right or left shall be given during not less than the last 100 feet traveled by the vehicle before turning.

(c) No person shall stop or suddenly decrease the speed of a vehicle without first giving an appropriate signal in the manner provided herein to the driver of any vehicle immediately in the rear when there is opportunity to give such signal.

66. The signals herein required shall be given either by means of the hand and arm or by a signal lamp or signal device, but when a vehicle is so constructed or loaded that a hand and arm signal would not be visible both to the front and rear of such vehicle then said signals must be given by such a lamp or device.

67. All signals herein required given by hand and arm shall be given from the left side of the vehicle in the following manner and such signals shall indicate as follows: 1. Left turn - hand and arm extended horizontally. 2. Right turn - Hand and arm extended upward or moved with a sweeping motion from the rear to the front. 3. Stop or decrease speed - Hand and arm extended downward."

We agree with the contention of plaintiff that the testimony in behalf of the defendants admitted either of the following facts:

(1) that defendant Walker came up to the place of the contact, turned, stopped and listened, and then lit his directional light, or (2) that he lit the directional light within 50 feet before he turned, and not 100 feet as required by statute. As the court, in effect, found that the defendants were guilty of the negligence charged and that such negligence was the proximate cause of the injuries, the only question is whether Lehman was guilty of contributory negligence. According to the evidence, the truck was proceeding north in the street car tracks. The truck driver did not see the automobile before the time he saw the flash of the lights, just before the impact took place. There is no evidence that the plaintiff was driving at a high rate of speed, in fact, it is clear that he was driving at a reasonable rate of speed. He was driving in the space between the street car tracks and the curb, and he had a right to expect that if the truck was to be turned to the east that an

Highways, (Rev. 1961, and the 1962, 1963, 1964, 1965, 1966, 1967, 1968)

Witnesses

Q. (a) Do you recall seeing a vehicle from a distance
course when a light-colored car with dark wheels and a
made with a convertible top and dark color. I recall
vehicle signal by turning the light on my left side
observed by your movement at about 100 feet from the signal
in the manner previously described in the report of the
vehicle was not observed by your movement.

(b) A signal of intention to turn right or left shall
be given during the time from the first time the vehicle
the vehicle becomes moving.

(c) A person shall not be knowingly observed the movement
of a vehicle signal light giving an intention signal in the
manner previously described in the report of the vehicle
as the time when there is a change in the signal light.

Q. The signal light was changed shall be given when
by means of the hand or by a signal light or signal
but when a vehicle is an intention to turn right or left
the signal light was changed when the hand or foot or other
movement was made which was a change in the signal light.

Q. All signal lights shall be changed when the hand or foot
movement was made which was a change in the signal light
and when the signal light was changed when the hand or foot
movement was made which was a change in the signal light
and when the signal light was changed when the hand or foot
movement was made which was a change in the signal light.

to agree with the statement of witness that the testimony in
behalf of the defendant is correct in the following facts:

(1) That defendant after coming up to the light of the witness, turned
around and looked, and then lit his cigarette light, or (2) that

he lit the cigarette light while he was before the witness, and
not 100 feet as testified by witness. As the witness, in effect, found
that the defendant was guilty of the negligence charged and that

such negligence was the proximate cause of the injury, the only
question is whether witness was guilty of contributory negligence.
According to the evidence, the truck was proceeding north in the

street car tracks. The truck driver did not see the automobile
before the time he saw the flash of the light, just before the
instant took place. There is no evidence that the plaintiff was

driving at a high rate of speed, in fact, it is clear that he was
driving at a reasonable rate of speed. He was driving in the space
between the street car tracks and the curb, and he had a right to

expect that if the truck was to be turned to the east that on

appropriate signal would be given. Defendants argue that it was the duty of Lehman to pass the truck on the left. It is obvious from the unusual subdivision of the traffic lanes, and the fact that the automobile was proceeding north in the lane between the street car tracks and the curb, that it would be unreasonable to expect plaintiff to pass to the left of the truck, nor would it be reasonable to argue that Lehman could have expected the truck to suddenly turn right from the street car tracks to cross a space of about 12 feet. The question of contributory negligence is one which is preeminently for the consideration of the jury. We do not believe that any one can reasonably assail the verdict on the ground that it is excessive. The injuries were serious and are of a permanent nature, and we are satisfied that the sum of \$6,500, which the jury awarded, is not unreasonable. We are of the opinion that the action of the trial court in setting aside the judgment was a clear abuse of discretion. Therefore, the order of the Superior Court of Cook County setting aside the judgment and awarding a new trial, is reversed, and judgment is entered here upon the verdict in favor of the plaintiff, Guy V. Lehman and against the defendants, James A. Hannah and Archie Walker, in the sum of \$6,500, plus interest at the rate of 5% per annum from February 7, 1940, in accordance with the provisions of Section 3, Chapter 74, Ill. Rev. Stat. 1939.

ORDER REVERSED AND JUDGMENT HEREIN.

HEBEL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

appropriate signal could be given. Automobiles were that it was
the duty of drivers to keep the street on the left. It is obvious
from the unusual combination of the traffic laws, and the fact that
the automobile was proceeding north in the lane between the street
and the sidewalk, that it would be unreasonable to expect
plaintiffs to pass to the left of the truck, and would it be reasonable
to expect that defendant would have expected the truck to suddenly turn
right from the street and travel in across a space of about 12 feet.
The question of contributory negligence is one which is immaterially
the fact combination of the facts. We do not believe that any one
can reasonably expect the verdict on the ground that it is necessary
The injuries were serious and are of a permanent nature, and we
are satisfied that the sum of \$5,000, which the jury awarded, is
not unreasonable. We are of the opinion that the action of the
trial court in setting aside the judgment was a clear abuse of
discretion. Therefore, the order of the District Court of Cook
County setting aside the judgment and awarding a new trial, is
reversed, and judgment is entered with costs against the plaintiff in favor
of the plaintiff, say V. Johnson and against the defendant, James
A. Hannah and Annie Taylor, in the sum of \$5,000, with interest
at the rate of 6 per annum from February 7, 1900, in accordance
with the provisions of Section 2, Chapter 74, Ill. Rev. Stat. 1900.

GRACE EVERETT and JACOB H. HARRIS, J. HARRIS.

41295

CHARLES M. UPHAM,

SAMUEL KERR,

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Appellant.

307 I.A. 244²

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On September 7, 1939, Charles M. Upham filed a statement of claim in the Municipal Court of Chicago against Samuel Kerr and Claire M. Kerr and therein averred that in June, 1939, he was a licensed real estate broker and was authorized by defendant to obtain a purchaser for certain real estate located at Altgeld Street and Harlem Avenue, Chicago, for the sum of \$15,000; that defendant promised to pay plaintiff a commission, if the latter succeeded, in accordance with the rates prescribed by the Chicago Real Estate Board; that plaintiff obtained Charles E. Hirsch as a purchaser at a price of \$15,000, who was and is ready, willing and able to purchase at such price, and that thereby plaintiff earned the sum of \$750. Claire M. Kerr was not served with process and did not appear. In an affidavit of defense defendant admitted that he authorized the plaintiff to obtain a purchaser for the real estate for the sum of \$15,000, and that he promised to pay a commission in accordance with the rules of the Chicago Real Estate Board; that such authorization was given on June 27, 1939; that such authorization gave plaintiff the exclusive right to find a purchaser for such property for a period of two weeks only, or until July 11, 1939; that plaintiff did not within such period procure a purchaser; that on July 11, 1939, the authorization expired; that defendant did not renew the authorization and did not at any time thereafter employ plaintiff as his broker; denied that pursuant to the authorization plaintiff obtained one Charles E. Hirsch as the purchaser, and that Charles E. Hirsch was then, or at the time of the filing of the affidavit of defense, ready, willing and able to purchase the real estate at the price of \$15,000, and denied that plaintiff had earned

444 A. I. 308

any commission. The cause was tried before the court without a jury and resulted in a finding and judgment for plaintiff and against defendant in the sum of \$750, to reverse which this appeal is prosecuted. Plaintiff's theory of the case is that "he was authorized by defendant to sell certain real estate owned by defendant for \$15,000, and that having procured a purchaser who was ready, willing and able to buy at defendant's price prior to refusal of defendant to sell at such price, he has therefore earned the commissions agreed to be paid." The theory of defendant is that the authorization "terminated by express limitation on July 11; that if it extended beyond July 11, it was terminated by the declaration to the plaintiff by the defendant on August 9 or August 14, that the defendant would not sell the property for \$15,000; and that the plaintiff is barred from recovery by his breach of faith in withholding from the defendant information about the \$350 Kroger lease."

The first point urged by defendant as a ground for reversal is that "the promise of an owner of real estate to pay a broker a commission for negotiating a sale of the real estate is merely an offer of a reward, where no consideration is paid for the promise, and the owner has the right to withdraw the offer at any time before the broker has done that for which he was to have been paid without making himself liable to the broker." The defendant does not challenge this statement, but asserts that a real estate broker employed to make a sale of land, who, prior to revocation of his authorization, procures a purchaser at the price fixed by the owner, who is ready, willing and able to take a conveyance and pay the purchase price, has earned the compensation agreed to be paid. Therefore, there is no substantial dispute between the parties as to the law of the case. We agree with the contention of plaintiff that in a case tried without a jury, the findings of the court upon the evidence are conclusive of the facts unless there is error of law in the proceedings, or unless the findings are so manifestly

The first point raised by defendant as a ground for reversal is that "the promise of an owner of real estate to pay a broker a commission for negotiating a sale of the real estate is merely an offer of a reward, where no consideration is paid for the promise, and the owner has the right to withdraw the offer at any time before the broker has done that for which he was to have been paid without giving plaintiff cause of action." The court says that it cannot challenge this statement, but assumes that a trial judge might employ to make a sale of land, etc., under no reservation at his authorization, procure a purchaser at the price fixed by the owner, who is ready, willing and able to take a conveyance and pay the purchase price, and earned the compensation agreed to be paid. Therefore, there is no substantial difference between the parties as to the law of the case. We agree with the contention of plaintiff that in a case tried without a jury, the findings of the court upon the evidence are conclusive if the facts undisputed by either party are in the process of law, or unless the findings are manifestly

against the weight and preponderance of the evidence that the reviewing court may say that they are the result of passion, prejudice or mistake. Gratist Street Warehouse Co. v. St. Louis, Alton & Terre Haute Railroad Co., 183 Ill. App. 405. Defendant insists that the judgment is against the manifest weight of the evidence. In order to pass on this point, we have carefully read the testimony as it appears in the transcript.

Plaintiff is a licensed real estate broker in Chicago. Defendant is the manager of the real estate department of the Chicago Division of the Socony Vacuum Oil Company, with an office at 59 East Van Buren Street, Chicago. Defendant and his brother, William D. Kerr, a Chicago lawyer, owned a 50 foot lot at Harlem Avenue and Altgeld Street, Chicago, on which there was a temporary structure occupied by a real estate broker. The title was in the name of defendant. Plaintiff testified that in the early part of May, 1939, he called on defendant; that he told defendant that he (plaintiff) might be able to find a purchaser for the property; that defendant told him the property was for sale and that the price was \$15,000; that he called on defendant at his office three or four days later and told him (defendant) that he had a buyer who had looked at the property and was willing to make an offer of \$13,500; that defendant stated that he would wait until somebody offered him \$15,000; that about a week thereafter witness saw defendant again and stated that his prospect owned a 50 foot piece of real estate on Belmont Avenue and was willing to convey this piece of real estate to defendant and pay \$9,000 in addition; that defendant stated he would give the proposition consideration and asked witness to return the following week; that the following week witness returned, at which time defendant informed him that he had looked at the Belmont Avenue property and investigated the value, and that such property was worth about \$3,000, which, added to the \$9,000, would make the offer for his (defendant's) property \$11,000; that defendant told witness he

was going to wait until he got a \$15,000 offer; that four or five days later witness again talked to defendant at the latter's office and told him that the prospective buyer with whom he had been negotiating was no longer interested, but that he, (witness) had met a broker by the name of Leroy Hirsch, with whom he discussed the property, and that Hirsch might be interested in purchasing for \$15,000; that he was working in cooperation with Hirsch to get the purchaser to come up to his price; that defendant stated he would not back down on an offer of \$15,000; that on June 27, 1935, Leroy Hirsch, a broker, and witness called on defendant at the latter's office and witness introduced Hirsch as a cooperating broker; that Hirsch told defendant that the buyer he had was working on the deal, and that he was, he thought, very close to a deal; that should a deal be made he wanted to know when possession could be delivered; that defendant immediately telephoned his brother, William D. Kerr, and stated that his brother had advised him that it was necessary to give the occupant of the real estate office on the premises 30 days notice to vacate; that Hirsch asked whether his purchaser could take the property subject to taxes; that plaintiff stated to Hirsch that he believed that any savings to be effected should accrue to defendant; that Hirsch then stated to defendant that he wanted assurance that defendant would sell for \$15,000 "when our buyer is ready"; that defendant said, "Mr. Upham [plaintiff] has had an exclusive on this property and I will be glad to extend it and give you plenty of time"; that defendant stated that he was going on his vacation and that "if we were ready while he was away on his vacation to close the deal, we should contact his brother, who is and was an attorney, who would handle the details of the deal anyway even if he [defendant] were in town"; that before witness and Leroy Hirsch left, witness stated that he wanted it understood that if he was successful in producing a purchaser he would receive the regular Real Estate Board rate of commission; that defendant inquired what

was going to sell until he got a \$10,000 offer; that later on five days later witness again stated he had heard of the \$10,000 offer and said that the prospective buyer with whom he had been negotiating was no longer interested, but that he (witness) had met a broker by the name of Henry Nixon, with whom he discussed the property, and that Nixon might be interested in purchasing for \$15,000; that he was working in connection with Nixon to get the property to come on the list; that witness stated he would not back down on an offer of \$15,000; that on June 27, 1932, Henry Nixon, a broker, and witness called on defendant to see latter's office and witness introduced Nixon as a prospective broker; that Nixon told witness that the night he had been working on the deal, and that he was, at that time, very close to a deal; that should a deal be made he would be known when possession could be delivered; that defendant immediately telephoned his brother, William D. Berry, and stated that his brother had advised him that it was necessary to give the payment of the cash advance either on the premises or by check; that Nixon asked whether his brother could take the property subject to taxes; that defendant stated to Nixon that he believed that any savings he had collected should accrue to defendant; that Nixon then stated to defendant that he wanted assurance that defendant would sell for \$15,000 when an offer is ready; that defendant said, "Mr. Nixon (plaintiff) has had an exclusive on this property and I will be glad to extend it and give you plenty of time"; that defendant stated that he was going on his vacation and that it was very ready while he was away on his vacation to close the deal; that should witness be present, who is and was an attorney, who would handle the details of the deal anyway even if he [defendant] were in town; that before witness and Henry Nixon left, witness stated that he wanted it understood that it was not necessary in preparing a purchase agreement to include the payment of cash advance; that defendant immediately called

the commission would be, and that witness told him so; that defendant then stated that he wanted it understood he would not be liable for two commissions, one to Leroy Hirsch and one to witness; that witness then told defendant that he need not worry about that, and that he need only look to witness in the payment of commission; that about three weeks after June 17, 1939, Leroy Hirsch told witness that his buyer was just about ready to sign a contract and that witness telephoned defendant's office and was told by his secretary that defendant was on his vacation; that the secretary suggested that he telephone to William Kerr; that witness telephoned William Kerr, who stated that he knew the witness and knew of the pending negotiations; that witness told Kerr that "it looked like within the next two or three days we will be ready to sign a contract and close the deal"; that Kerr stated "when you are ready, if you will 'phone me I will be glad to meet with you"; that three days thereafter witness stated that he was ready to have a meeting in order to discuss the mechanics of closing the deal; that an appointment was made for the following afternoon at 3 o'clock, which appointment was kept by Leroy Hirsch and witness with William Kerr at the latter's office; that "we told him that while we did not have a check in our pockets at the time, that we felt quite certain that in the next day or so we would be ready to tender him a signed contract"; that Kerr stated "that was all right, he was ready whenever we were"; that they discussed whether to draft a regular real estate contract or an escrow agreement; that William Kerr stated that was immaterial, that considerable title work had to be done, and that "if I see that you really mean business and you have \$1,000 to put up, I will proceed with the title work, and by that time my brother will be back from his vacation"; that in fact after having received the telephone call from witness the day before, he had wired his brother and located him in California and found that his brother would be back the early part of the following week; that defendant Samuel Kerr got back

The defendant would be, and the witness said his only reason for
 then stated that he wanted to know if he could be allowed to
 two conditions, one to Jerry Nines and one to witness; that witness
 then told defendant that he would not carry about that, and that he
 need only look to witness as the payment of conditions; that about
 three weeks after that, in 1935, Jerry Nines called witness and
 his buyer was just about ready to sign a contract and that witness
 telephoned defendant's office and was told by his secretary that
 defendant was on his vacation; that the secretary suggested that
 he telephon to Jerry Nines and witness telephoned Jerry Nines
 who stated that he knew the witness and knew of the pending negotia-
 tion; that witness said that he would like to know the price for two
 two or three days as will be ready to sign a contract and close the
 deal; that Jerry stated "when you are ready, let me call, I know we
 I will be glad to meet with you"; that witness says thereafter witness
 stated that he was ready to have a meeting in order to discuss the
 purchase of the stock; that he discussed with Jerry Nines the
 the following afternoon at 4 o'clock, which arrangement was made by
 Jerry Nines and witness with witness at the latter's office;
 that "we told him that while we did not have a check in our pockets
 at the time, that we felt quite certain that in the next day or so
 we would be ready to transfer him a signed contract"; that Jerry stated
 "that was all right, he was ready whenever we were"; that they
 discussed whether to draft a regular real estate contract or an
 other agreement; that witness said that they were instructed, that
 considerable title work had to be done, and that "if I see that you
 really mean business and you have \$1,000 to put up, I will proceed
 with the title work, and by that time my brother will be back from
 his vacation"; that in fact after having received the telephone call
 from witness the day before, he had wired his brother and located
 him in California and found that his brother would be back the early
 part of the following week; that defendant's brother said that

from his vacation on Monday, August 7, 1939; that witness telephoned him and told him that "we were ready to close the deal"; that he was very busy that day and suggested that witness call the following day; that the following day, Tuesday, August 8, 1939, witness telephoned defendant, who stated that he wasn't sure whether or not he was going through with the deal; that witness asked him, "Why not", and defendant said he understood there was a Kroger lease made on the property, and that if that was a fact he did not know whether he was going to make the deal; that witness suggested that they have lunch the next day, and that the parties had lunch the next day, which was Wednesday, August 9, 1939; that witness told defendant that there was a Kroger lease signed, calling for a building to be erected on the property and the payment of a rental of \$350 per month; that witness told him that "my buyer was ready, willing and able to consummate the deal in accordance with our agreement and to pay cash for the property in the sum of \$15,000"; that defendant said he did not know whether he would sell, that he wanted to give it some thought and suggested that if he did not call the witness between then [Wednesday] and the following Monday, that witness should call him; that on the following Monday, August 14, 1939, he telephoned defendant and that the latter told him he was definitely not going to sell for \$15,000; that on August 17, 1939, LeRoy Hirsch, Charles Hirsch and witness called on defendant and tendered a real estate contract signed by Charles Hirsch, calling for the purchase of the property for the sum of \$15,000; that he tendered \$1,000 in cash as a down payment until the title could be examined and the deed passed; that defendant declined to receive the deposit or the contract and stated, "I have told you I was not interested in selling for \$15,000." LeRoy Hirsch, called by plaintiff, testified that he was a real estate broker, and, in substance, corroborated plaintiff's testimony. He further testified that he told defendant "the plans and that will take time, will you give us, or will you

From his vacation on August 1, 1935; that witness telephoned him and told him that he was ready to close the deal; that he was very busy that day and suggested that witness call the following day; that the following day, Tuesday, August 6, 1935, witness telephoned defendant, who stated that he would come whether or not he was going through with the deal; that witness asked him, "Why not?" and defendant said he understood there was a higher loan made on the property, and that if that was a fact he did not know whether he was going to make the deal; that witness suggested that they have lunch the next day, and that the parties had lunch the next day, which was Wednesday, August 7, 1935; that witness told defendant that there was a higher loan signed, calling for a building to be erected on the property and the payment of a rental of \$200 per month; that witness told him that "my paper was ready, willing and able to consummate the deal in accordance with our agreement and to pay cash for the property in the sum of \$15,000"; that defendant said he did not know whether he would sell, that he wanted to give it some thought and suggested that if he did not call the witness between then [Wednesday] and the following Monday, that witness should call him; that on the following Monday, August 12, 1935, he telephoned defendant and that the latter told him he was definitely not going to sell for \$15,000; that on August 17, 1935, Tuesday, witness, Charles Hirsch and witness called on defendant and received a real estate contract signed by Charles Hirsch, calling for the purchase of the property for the sum of \$15,000; that he tendered \$1,000 in cash as a down payment and the balance would be paid in cash and the deed passed; that defendant declined to receive the deposit of the remaining cash and stated, "I have told you I was not interested in selling for \$15,000." Leroy Hirsch, called by plaintiff, testified that he was a real estate broker, and, in substance, corroborated Hirsch's testimony. He further testified that he told defendant the same and that the time, with you five or six, at all times

assure us you will sell for \$15,000 within a reasonable time so I can work out the balance of this deal"; that he (defendant) said Mr. Upham had an exclusive for some time past and that he would give him time to work on it; that witness said, "I'm not interested in any exclusive, I just want your word, and if you will shake hands with Mr. Upham that you will deliver for \$15,000, that is all I want, and Mr. Upham asked him about the commission"; that witness and plaintiff both assured him there would be only one commission. Charles E. Hirsch, called by plaintiff, testified that he was an attorney and a brother of Leroy Hirsch, the cooperating broker. His testimony tended to corroborate the testimony of plaintiff and Leroy Hirsch as to the conversation and occurrence at the time the contract and check were rejected on August 16, 1939. Witness also testified to facts showing that he was ready, willing and able to consummate the deal for the sum of \$15,000.

In behalf of defendant, Fred Breitling, a real estate broker in Chicago, testified that he knew plaintiff and defendant; that in the latter part of July, 1939, he had a conversation with plaintiff concerning the deal; that plaintiff then told witness that "they were getting pretty close to a deal"; that witness said he understood "your exclusive expired", and that plaintiff answered, "Yes, but that didn't concern him, he was proceeding with his negotiations nevertheless." William D. Kerr, testifying for defendant, stated that he talked to plaintiff about the deal on Monday, July 24, 1939, on which day plaintiff called witness on the telephone and stated that he had called defendant, whose office had referred witness to him; that plaintiff said to witness, "I have an exclusive on the property at Harlem and Altgeld Avenue"; that witness interrupted plaintiff and told him that his understanding was that any "exclusive option or commitment you may have had on that property has expired"; that plaintiff stated, "That's true, but nevertheless I am working on a deal on the lot"; that witness then stated that with that under-

...as you will call for it, I will bring it to you at the time as I
can work out the balance of this debt; that he (testimony) said
Mr. Upton had an exclusive for some time past and that he would
give him time to work on it; that witness said, "I'm not interested
in any exclusive, I just want your word, and if you will please handle
with Mr. Upton that you will deliver for \$12,000, that is all I want,
and Mr. Upton asked him about the Commission; that witness and
plaintiff both wanted him there would be only one Commission.
Charles E. Witsell, called by plaintiff, testified that he was an
attorney and a brother of James Witsell, was consulting brother. His
testimony tended to corroborate the testimony of plaintiff and
James Witsell as to the conversation and agreement at the time the
contract and check were signed on August 14, 1932. Witness also
testified as to the check that he was given, signing and cashing the
check for the sum of \$12,000.
In behalf of defendant, Fred Spielmann, a real estate
broker in Chicago, testified that he knew plaintiff and defendant;
that in the latter part of July, 1932, he had a conversation with
plaintiff concerning the deal; that plaintiff then said witness that
"they were getting pretty close to a deal"; that witness said he
understood "your exclusive rights", and then plaintiff answered,
"Yes, but that didn't concern him, he was proceeding with his own
business arrangements." Witness E. Witsell, brother of James Witsell,
stated that he talked to plaintiff about the deal on Monday, July 24,
1932, on which day plaintiff called witness on the telephone and
stated that he had called defendant, whose office had returned witness
to him; that plaintiff said to witness, "I have an exclusive on the
property at Harlem and Fifth Avenue; that witness interested
plaintiff and told him that his understanding was that any "exclusive
option or commitment you may have had on that property was expired;
that plaintiff stated, "That's true, but nevertheless I am working
on a deal on the lot"; that witness then stated that with that under-

standing he would talk to plaintiff; that plaintiff then told witness that he was working on a deal that he hoped to bring to a head the latter part of the week and that he wanted to get in touch with defendant; that witness told him defendant was on the Pacific Coast; that he, witness, informed defendant that plaintiff had something in prospect and would ascertain where defendant could be reached the latter part of the week; that on Monday, July 31, 1936, plaintiff came to witness's office, accompanied by Leroy Hirsch, who was introduced to witness; that Hirsch or plaintiff stated that they were working on a deal for the purchase of the property and expected to have a contract signed the following day; that they were concerned about the possession and asked if a cancellation notice could be sent to the tenant; that witness said he would not feel justified in issuing a cancellation notice until he knew there was a contract that was satisfactory to defendant; that witness had succeeded in contacting his brother, the defendant, and was informed that he was leaving Los Angeles for Chicago that day; that Hirsch stated that he had talked with defendant to the effect that the purchase price of \$15,000 would be paid 50% in cash and 50% secured by a relatively short term mortgage; that defendant had told Hirsch that he thought the arrangement could be worked out; that witness replied that there were a number of questions regarding the time factor in the contract; that he, witness, did not believe anything could be accomplished by discussing details of terms until there was an agreement, and that he, witness, was not authorized to approve anything, that he was not disposed to say anything until defendant's return; that plaintiff and Hirsch asked him whether there should be a contract or escrow agreement; that he, witness, stated that he had not thought particularly about that, but that "if there is a meeting of the minds, or an agreement and a purchaser has put up a thousand dollars or thereabouts, the rest will be a matter of detail"; that plaintiff or Hirsch said that Hirsch's brother, a lawyer, was preparing a contract;

that he was working on it and that he wanted to bring it to a head the
last part of the week and that he wanted to get it ready by
Monday; that witness told him that he would see him on Monday;
that he, witness, informed defendant that witness had something
a prospect and would communicate some information about it to him
the latter part of the week; that on Sunday, July 21, 1907, witness
came to witness's office, accompanied by Henry Wilson, who was
introduced to witness; that witness on August 1st, 1907, went
working on a deal for the purchase of the property and arranged to
have a contract signed the following day; that they were concerned
about the possession and asked if a communication might be
sent to the tenant; that witness said he would not feel justified
in issuing a communication until he knew there was a contract;
that was satisfactory to defendant; that witness had succeeded in
contacting his brother, the defendant, and was informed that he was
leaving Los Angeles for Chicago that day; that witness stated that he
had talked with defendant as to the effect that the proposed price of
\$15,000 would be paid now in cash and the balance by a promissory
note; that defendant had said through him to demand
the arrangement could be worked out; that witness replied that there
were a number of questions regarding the time factor in the contract;
that he, witness, did not believe anything could be accomplished by
discussing details of terms until there was an agreement, and that
he, witness, was not authorized to agree anything; that he was not
authorized to say whether there should be a contract or not;
and witness asked him whether there should be a contract or not;
witness; that he, witness, stated that he had not thought before-
time about that, but that "if there is a meeting of the minds, or
an agreement and a business has got up a thousand dollars or there-
abouts, the rest will be a matter of detail"; that plainly on

that they (plaintiff and LeRoy Hirsch) expected the contract would be completed and signed the following day; that witness stated that he expected to be in his office all the following day and that if they wanted to talk to him they could do so; that he had a conversation with plaintiff on Friday, August 4, 1939, at which time plaintiff telephoned witness that Charles M. Hirsch, the lawyer, had been ill and that the contract had not been signed on August 1, 1939; that there had been some other delays, and that witness stated that his understanding was that his brother, defendant, would be back the end of that week and would be in his office the following Monday. Defendant testified in his own behalf and stated that plaintiff first contacted him on March 28, 1939; that plaintiff submitted various offers for the property, which were rejected; that on June 27, 1939, plaintiff and LeRoy Hirsch came to his office; that Hirsch asked witness what he was asking for the property and witness stated \$15,000; that witness also stated he would pay a commission; that at that time witness did not know whether Hirsch was an investor, a manager or a contractor or real estate broker; that he was then asked whether he would be willing to take one half cash; that witness said, "this will all be over within ninety days, all be built probably, and it looks to me like it might be workable"; that witness called his brother, a lawyer, who stated "it might be workable"; that Hirsch stated "we will have to have some time to work this out"; that he inquired how much time was wanted and stated that he had a lot of brokers working on the property and that he had submitted it to people; that he told about offers that had been made; that plaintiff and Hirsch answered that they wanted ten days or two weeks, and that witness replied he would give them two weeks; that witness left Chicago on his vacation on July 14, 1939, and returned on Monday, August 7, 1939; that plaintiff telephoned him that morning and said "he would like to get together with me to talk

about this proposed sale, and I supposed it was what Mr. Hirsch had been in to see me about and there had been a tentative appointment made to go to my brother's office the next day at 10:30 in the morning to discuss the terms"; that witness replied that he had talked to his brother the day before and that his brother had not mentioned anything about a tentative appointment, that he just got back to work and that he had other inquiries on the property; that plaintiff said he would like to get the matter settled; that witness informed plaintiff that "your two weeks were up before I went on my vacation and I didn't know what you were doing until I heard from my brother. He wired me a night letter and told me what was going on, and I said there will be no appointment tomorrow morning". Witness further testified that he told plaintiff that he went home the night before and took papers with him and made several pages of pencil calculations, and that he was trying to figure out whether he would be better off to sell the property for cash at \$15,000, or to build on a Kroger lease at \$350 a month, or to build a much more expensive type of building for a large concern comparable to Kroger; that plaintiff said he would come out to witness's house that night; that witness replied that he did not see what good that would do, and that plaintiff then proposed having lunch the following day, Wednesday, August 9, 1939; that they had lunch on that day, and that witness stated he did not like the fact that plaintiff had concealed from him that there was a \$350 lease from Kroger; that finally plaintiff wanted to know what defendant was going to do; that defendant said he would not sell for \$15,000; that witness said, "I will tell you this, as soon as I know what I am going to do about this property, I will let you know the first thing, along with other brokers who are working on this deal"; that by August 15, 1939, witness "had so many inquiries about this thing, I said to my brother, * * * we've got to make up our minds what we are going to do here and do something, because I am pestered with this thing"; that on August 18, 1939, he

about this proposed sale, and I mentioned it was about 10:00 AM. I had been in to see the agent and there had been a tentative arrangement made to go to my brother's office the next day at 10:00 in the morning to discuss the terms. That witness testified that he had talked to his brother the day before and that his brother had not mentioned anything about a tentative arrangement, that he had not gone back to work and that he had about finished on the property. When Plaintiff said he would like to get the matter settled; that witness informed Plaintiff that "your two weeks were up before I came on my vacation and I didn't know what you were doing until I heard from my brother. He said he was going to sell the house, and I said there will be no arrangement tomorrow morning".

Witness further testified that he said Plaintiff that he was going the night before and took private with him and made several copies of small calculations, and that he was trying to figure out whether he would be better off to sell the property for cash at \$15,000, or to build on a larger piece of land a month, or to build a house more expensive than at Plaintiff's house. Plaintiff said he would come out to witness's house that night; that witness replied that he did not see what good that would do, and that Plaintiff then proposed having lunch the following day, Wednesday, August 3, 1939; that they had lunch on that day, and that witness stated he did not like the fact that Plaintiff had announced from him that there was a \$1500 loan from Henry; that Plaintiff Defendant wanted to know what defendant was going to do; that defendant said he would not sell for \$15,000; that witness said, "I will tell you this, as soon as I know what I am going to do about this property, I will let you know the first thing, along with other business and the picture on this matter; that by August 15, 1939, witness said he was going to sell the house, and I said to my brother, 'I will let you know what my mind was about to do here and do something' because I am bothered with this thing"; that on August 15, 1939, he

succeeded in getting plaintiff on the telephone; that he then told plaintiff that he and his brother had decided to sell for \$25,000, and that he had already refused an offer of \$17,500 for the property."

There is no dispute that plaintiff was authorized by defendant to sell the real estate for the sum of \$15,000 and that defendant agreed to pay plaintiff a broker's commission of 5%, or \$750. According to plaintiff's version, on June 27, 1939, defendant said he would give plaintiff a reasonable time. Defendant, however, maintains that Leroy Hirsch, in the presence of plaintiff, asked defendant to be allowed ten days or two weeks within which to procure a purchaser, and that defendant assented by granting two weeks. Defendant declares that this period expired on July 11, 1939. It is conceded that a purchaser was not produced by that date. Plaintiff and Hirsch next spoke to William D. Kerr, an attorney and a brother of defendant. There is a sharp conflict between the testimony of plaintiff and Hirsch and that of William D. Kerr as to material parts of this conversation. Mr. Kerr did communicate with his brother who was on the Pacific coast, and apparently informed him of the visit and proposal of plaintiff and Hirsch. Plaintiff, (according to the testimony introduced in his behalf) telephoned defendant on August 7, 1939, the day defendant returned from his vacation, and told defendant that he and his people were ready to close the deal. Also, according to plaintiff's contention defendant told plaintiff on August 7, 1939, that he was very busy and that plaintiff should call him the next day. Plaintiff also maintains that he called defendant the next day and was informed that defendant had not determined whether or not to go through with the deal. Plaintiff further maintains that at their luncheon engagement the following day the deal was thoroughly discussed and defendant stated he did not know whether or not he would sell, that he wanted to give it further thought, and asked plaintiff to call him the following Monday, if plaintiff did not hear from him previous to that time, and that when

unsuccessful in getting plaintiff on the witness stand; that he then said plaintiff that he and his brother had decided to call for the property, and that he had already retained an offer of \$25,000 for the property. There is no dispute that plaintiff was arrested by defendant to sell the real estate for the sum of \$25,000 and that defendant agreed to pay plaintiff a broker's commission of \$2,500. According to plaintiff's version, on June 17, 1932, defendant said he would give plaintiff a reasonable time. Defendant, however, relates that later, in the presence of plaintiff, said defendant to be allowed ten days or two weeks within which to remove a porch, and that defendant agreed by granting two weeks. Defendant declares that this period expired on July 11, 1932. It is conceded that a porch was not removed by that date. Plaintiff and Hirsch next agree to witness H. Hirsch, an attorney and a brother of defendant. There is a sharp conflict between the testimony of plaintiff and Hirsch and that of William E. Hirsch as to what parts of this conversation. Mr. Hirsch his conversation with his brother who was on the Pacific coast, and apparently informed him of the visit and proposal of plaintiff and Hirsch. Plaintiff, according to the testimony introduced in the court, telephoned defendant on August 7, 1932, and was informed that the defendant was ready to close the deal. Plaintiff's contention defendant told plaintiff on August 7, 1932, that he was very busy and that plaintiff should call him the next day. Plaintiff also witnesses that he called defendant the next day and was informed that defendant had not determined whether or not to go through with the deal. Plaintiff further maintains that at their luncheon engagement the following day the deal was thoroughly discussed and defendant stated he did not know whether or not he would sell, but he called H. Hirsch to further contact, and when plaintiff he call him the following Sunday. Plaintiff did not hear from him previous to that time, and that when

plaintiff called defendant the following Monday, defendant stated he had decided not to sell for \$15,000. The testimony of defendant as to the conversation after defendant's return from his vacation, is at variance with the testimony of plaintiff. He did say, however, that on Tuesday he took various documents home with him in order to calculate as to whether to make the deal. Defendant maintains that the case was tried and presented to the court on the theory that plaintiff relied on the tender of the earnest money and the contract on August 17, 1939, for proof of having procured a purchaser. We have examined the pleadings and the testimony, and do not agree with this contention. Both parties agree that the principal cannot revoke the agency after the broker has procured a purchaser able, ready and willing to buy. (Purgett v. Reinrank, 319 Ill. App. 38.)

Where an owner of real estate employs a broker to sell it for him, there is a promise on the part of the owner to pay the broker for his services whenever the broker produces a prospective purchaser ready, willing and able to buy. When the broker has furnished a prospective buyer who is ready, willing and able to buy on the terms and conditions proposed, the contract is executed as far as the broker is concerned. (Glatt & Price v. Adam, 330 Ill. App. 331). From these authorities it will be seen that if plaintiff procured a purchaser who was ready, willing and able to buy on the terms stated, he earned his commission. We are of the opinion that there is ample evidence in the record to warrant the finding of the court that in the fore part of August, 1939, the plaintiff procured a purchaser who was ready, willing and able to buy for the sum of \$15,000 in cash, which was the purchase price demanded by defendant. It is true that at the time the formal written contract and the \$1,000 deposit were tendered to plaintiff, the right of plaintiff to act as a broker in the sale of the property had been terminated. However, there is competent testimony that plaintiff procured a purchaser who was ready, willing and able to buy on the terms stated, prior to the

plaintiff called defendant the following morning, defendant stated
he had decided not to sell for \$11,000. The defendant at defendant
as to the conversation after defendant's return from his vacation,
in at variance with the testimony of plaintiff. He did say, however,
that on Tuesday he took certain documents home with him in order to
calculate as to whether to make the deal. Defendant admits that
the case was tried and presented to the court on the theory that
plaintiff relied on the receipt at the instant money and the contract
on August 14, 1935, for proof of having procured a purchaser. He
have examined the affidavits and the testimony, and he had agreed with
this contention. Both parties agree that the witness cannot recall
the agency after the broker has procured a purchaser who is ready,
and willing to pay. (Plaintiff v. Defendant, 112 F.2d 100, 101.)
There is an error of fact stated perhaps a broker as well as for him,
there is a promise on the part of the owner to pay the broker for
his services rendered in procuring a purchaser ready,
ready, willing and able to pay. When the broker has procured a
prospective buyer who is ready, willing and able to pay on the terms
and conditions proposed, the contract is procured as far as the
broker is concerned. (Plaintiff v. Defendant, 112 F.2d 100, 101.)
From these authorities it will be seen that it is plaintiff's contention
purchaser who was ready, willing and able to pay on the terms stated,
he earned his commission. As one of the opinions that there is no
evidence in the record to warrant the finding of the court that it
the first part of August, 1935, the plaintiff procured a purchaser
who was ready, willing and able to pay for the sum of \$11,000 in
cash, which was the amount of the purchase price. It is true
that at the time the broker signed contract and the \$1,000 deposit
was tendered to plaintiff, the right of plaintiff to act as a broker
in the sale of the property had been terminated. However, there is
consistent testimony that plaintiff procured a purchaser who was
ready, willing and able to pay on the terms stated, prior to the

action of defendant in terminating the agency. It is plain that the action of plaintiff in tendering a contract and a deposit, was done only as a step in contemplation of an expected law suit, and did not add or detract from his right to a commission. The trial court heard the witnesses and had an opportunity to observe them. After a careful consideration of the evidence submitted, we are of the opinion that the findings of the trial judge are not against the manifest weight of the evidence.

Defendant further maintains that if the relationship of principal and agent was not otherwise terminated before August 17, 1939, plaintiff forfeited all right to a commission by withholding from the defendant knowledge of the increase in the amount of the Kroger rent. This point was not put in issue in the trial. It is not mentioned in defendant's affidavit of defense. Nevertheless, we are of the opinion that the record does not show that plaintiff failed to keep defendant informed as to the terms of the proposed deal, or that plaintiff was derelict in his duty as a broker.

For the reasons stated, the judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

of defendant in obtaining the money, it is clear that the action of plaintiff in bringing a complaint and a summons, and there only on a copy in contemplation of an execution for said, and did not act or intend from the right to a commission. The trial court found the evidence and had an opportunity to observe them. After a careful consideration of the evidence presented, we are of the opinion that the findings of the trial judge are not against the manifest weight of the evidence.

Defendant further complains that in the verification

of complaint and summons was not shown the defendant's name as principal, plaintiff furnished all signs as a commission to plaintiff. Then the defendant's knowledge of the law was in the record of the record. This point was not in issue in the trial. It is not mentioned in defendant's petition for judgment, notwithstanding we are of the opinion that the record does show that plaintiff failed to keep defendant informed as to the date of the proposed trial, and this complaint was revealed in the body of a report. The law requires that, the return of the complaint

Court of Chicago is affirmed.

JOSEPH A. BROWN.

JOSEPH A. BROWN, J. CLERK.

41327

WILLIAM L. O'CONNELL, as receiver of
Lincoln Trust & Savings Bank,

APPEAL FROM

v.

Appellee,

ABRAHAM JACOBS, et al.,

CIRCUIT COURT

On Appeal of ABRAHAM JACOBS,

COOK COUNTY.

Appellant.

307 I.A. 245

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On July 1, 1925, Abraham Jacobs, Shalem Jacobs, Sampson Jacobs and Elie Jacobs, being indebted in the sum of \$5,000, executed and delivered their promissory note for said sum, due 5 years after date, with interest at the rate of 8% per annum until maturity, and at the rate of 7% per annum after maturity, and on the same date, to secure the payment of the note, they executed, acknowledged and delivered a trust deed on the real estate known as 8140 North Kenneth Avenue, Niles Center, Cook County, Illinois, which premises were improved by a two story and basement brick flat building. On April 22, 1934, William L. O'Connell, as receiver of the Lincoln Trust & Savings Bank, filed a complaint in chancery in the Circuit Court of Cook County for the purpose of foreclosing the lien of the trust deed. On August 8, 1934, Frank F. Molinn, an attorney, filed the general appearance of Abraham Jacobs, Shalem Jacobs, Sampson Jacobs and Elie Jacobs and also filed an answer. On November 22, 1934, on motion of plaintiff, Frank F. Koeder was appointed receiver of the premises. He duly qualified as such receiver and took possession. A decree of sale was entered. Pursuant to such decree the property was sold by a Master in Chancery on December 22, 1935, to William L. O'Connell, as Receiver of the Lincoln Trust & Savings Bank, the mortgagee. On January 8, 1936, a decree was entered confirming the special commissioner's report of sale and distribution. Thereafter, on April 18, 1936, the court entered an order directing Abraham Jacobs to pay the receiver as

1917

WILLIAM A. O'CONNELL, as Receiver of the Lincoln Trust & Savings Bank

vs.

JACOBUS JACOBI, et al.

ON PETITION FOR WRIT OF HABEAS CORPUS

307 I.A. 245

1. JACOBUS JACOBI, a citizen of the State of New York,

on July 1, 1917, was arrested and committed to the custody of the

Jacobus and his family, who resided in New York City, and

executed and delivered their executory note and said note, due 5

years after date, with interest at the rate of 6 per annum until

maturity, and on the day of its maturity, and on

the same date, to secure the payment of the note, they executed,

acknowledged and delivered a trust deed on the real estate known

as First State Avenue, New York City, New York, containing

which premises were improved by a two story and basement brick flat

building, on April 1, 1917, William A. O'Connell, as Receiver

of the Lincoln Trust & Savings Bank, filed a petition in conformity

in the district court of Cook County for the purpose of foreclosing

the lien of the trust deed. On August 5, 1917, Frank J. Jacobus,

an attorney, filed the general appearance of Jacobus Jacobus, Deline

Jacobus, Benjamin Jacobus and his family and also filed an answer. On

November 12, 1917, an order of dismissal, Frank J. Jacobus was

appointed receiver of the premises. He was qualified as such

receiver and took possession. A decree of sale was entered. Pursuant

to such decree the property was sold by a sheriff in conformity on

November 22, 1917, to William A. O'Connell, as Receiver of the

Lincoln Trust & Savings Bank, the mortgagee. On January 8, 1918, a

decree was entered confirming the special commissioner's report of

sale and distribution. Whereafter, on April 12, 1918, the court

issued an order directing Abraham Jacobus to pay the receiver as

rent for the use and occupancy of the first apartment, the sum of \$12.00 per month. He continued to reside on the premises and complied with the order to pay \$12.00 a month rent. On April 23, 1937, the statutory period of redemption having expired, a master's deed was issued to Charles J. Albers, successor to William L. O'Connell, as receiver of the Lincoln Trust & Savings Bank. On May 15, 1937, the solicitor for plaintiff served notice on Frank F. McGinn, solicitor for defendants, that on May 20, 1937, he would appear before the Chancellor to whom the case was assigned, and present the first and final report and account of Frank F. Roeder, Receiver, and ask that the same be approved and the receiver discharged. On June 4, 1937, Frank F. Roeder, Receiver, filed his first and final report and account, which showed receipts of \$497.00 and disbursements of \$475.77, leaving a cash balance to the credit of the estate of \$21.23. The receiver also reported to the court that on May 1, 1937, he surrendered the possession of the premises to the grantee of the master's deed. On June 4, 1937, the court entered an order approving the report and account, allowing the receiver the balance of \$21.23 for his services, and discharging the receiver. On October 10, 1938, Abraham Jacobs filed a verified petition and motion in the nature of a writ of error coram vobis. The petition recited inter alia that "during the tenure of said Frank F. Roeder as receiver, on to-wit: August 16, 1936, in his capacity as receiver of said premises did employ one Leo Karowski to spray and otherwise chemically treat said premises for the purpose of exterminating insects and vermin infesting said premises; that during the course of their employment and while chemically treating said premises, and as a direct and proximate result of the negligence of said Leo Karowski and his employee, one Larry Cooper, an explosion occurred and fire resulted which caused your petitioner to become seriously burned, shocked and permanently disabled; * * * that notwithstanding the fact that the hereinabove stated accident to your petitioner

...and was accompanied by the first respondent, the son of
...the respondent, who remained in residence on the premises and
...complied with the order to pay \$10.00 a month rent, on April 15,
1937, the respondent, having no objection having arisen, a check for
said sum was issued to Charles E. Jones, Treasurer of the Village of
O'Connell, as receiver of the Village of O'Connell, on
May 18, 1937, the respondent having previously received notice on March
2, 1937, of the respondent's delinquency, and on May 18, 1937, he would
appear before the respondent to show the same and defend, and
present the first and final report and account of Charles E. Jones,
Receiver, and that the same be approved and the receiver dis-
charged. On June 4, 1937, Charles E. Jones, Receiver, filed his first
and final report and account, which showed receipts of \$10.00 and
disbursements of \$475.77, leaving a cash balance in the hands of
the estate of \$465.77. The receipt also recited in the entry that
on May 1, 1937, he represented the collection of the balance in
the hands of the estate's debt. On June 4, 1937, the court entered
an order approving the report and account, discharging the receiver,
the balance of \$465.77 for his services, and discharging the receiver.
On October 10, 1938, respondent became a verified petitioner and
petition in the nature of a writ of error coram nobis. The petition
recited inter alia that during the tenure of said Charles E. Jones
as receiver, on or about August 18, 1936, in his capacity as receiver
of said premises said entry one Joe Katoski to carry and deliver
chemically treated said premises for the purpose of exterminating
insects and vermin infesting said premises; that during the tenure
of said respondent and while respondent exercised said powers,
and as a direct and proximate result of the negligence of said Joe
Katoski and his employee, one Harry Cooper, an explosion occurred
and fire resulted which caused great damage to become seriously
damaged, shocked and permanently disabled; * * * that notwithstanding
the fact that the respondent stated incident to your petition

occurred during the tenure of the said Frank F. Roeder, as receiver, and notwithstanding the fact that the said Frank F. Roeder, receiver, had notice and knowledge of said accident, the said Frank F. Roeder did, with intent to conceal from the court the herein described negligent act, fraudulently and wilfully, wholly fail to account and report said occurrence to this honorable court, and, in pursuance of said wilful concealment, did wholly fail to account for the expenditure of money involved in the employment of the said Leo Kuroski in regard to the said extermination work contracted for, either in the verified report and account or list of vouchers; and as a result of such fraudulent concealment the court was kept in ignorance of said accident and as a result of said fraudulent concealment, this court did approve said report and account and entered an order discharging said Frank F. Roeder as receiver on June 4, 1937, to the detriment of your petitioner; " * * " that on June 8, 1937, your petitioner did file a complaint in law in the Circuit Court of Cook County entitled Jacobs vs. Roeder, et al., No. 370 7046, setting forth in necessary detail the acts of negligence on the part of said defendant; that on April 30, 1938, an amended complaint was filed in said action; that the said Chas. H. Albers, Receiver of the Lincoln Trust & Savings Bank, was dismissed as party defendant on January 31, 1939, and that appearance and answers were filed on behalf of the other defendants in said law suit." The petition prayed that the order of the court approving the first and final account of Frank F. Roeder, as receiver, and the order discharging the receiver, be vacated, and that "this cause be consolidated with the case of Jacobs vs. Roeder, et al., No. 370 7046, and that all issues be tried in this cause as an action in the nature of a bill of equity to adjust the rights of the parties hereto"; that any judgment rendered against Frank F. Roeder be made a lien upon the premises, and that a rule be entered against Frank F. Roeder to show cause why he should not be held in contempt for failure to

occurred during the term of the said term of the said term, in violation
and notwithstanding the fact that the said term of the said term, in violation
had notice and knowledge of said violation, the said term of the said term
did, also, intend to commit the said violation, and the said term of the said term
negligent act, in violation of the said term of the said term, in violation
and to say that said violation is in violation of the said term of the said term, in violation
violation of the said term of the said term, in violation of the said term of the said term, in violation
for the expiration of money received in the violation of the said term of the said term, in violation
said law is intended to be used in the said violation of the said term of the said term, in violation
Not, either in the violation of the said term of the said term, in violation of the said term of the said term, in violation
and as a result of such violation, the said term of the said term, in violation of the said term of the said term, in violation
in violation of the said term of the said term, in violation of the said term of the said term, in violation
consequence, this court did not find the said term of the said term, in violation of the said term of the said term, in violation
entered an order restraining said term of the said term, in violation of the said term of the said term, in violation
June 2, 1907, to the effect of that judgment, in violation of the said term of the said term, in violation
June 6, 1907, that judgment and that a complaint be laid in the
District Court of the District of Columbia, in violation of the said term of the said term, in violation
EVC 7048, setting aside the judgment of the said term of the said term, in violation of the said term of the said term, in violation
on the part of said judgment; that on April 30, 1907, an order
complaint was filed in said court; that the said term of the said term, in violation of the said term of the said term, in violation
Receiver of the Lincoln Trust & Savings Bank, was allowed to pay
defendant on January 31, 1908, and that defendant and interest
were filed on behalf of the other defendant in said law suit. The
petition prayed that the order of the court approving the first and
final account of William H. Woods, as receiver, and the other ac-
counting the receiver, be reversed, and that this court be com-
pelled with the case of Jacobs vs. Woods, et al., No. EVC 7048,
and that all issues be tried in this court as an action in the nature
of a bill of equity to require the return of the money received;
that the receiver be required to return to the said term of the said term, in violation of the said term of the said term, in violation
from the receiver, and that a bill be entered against the said term of the said term, in violation of the said term of the said term, in violation
it was shown why he should not be held in contempt for failure to

present a full, true, accurate and complete report and account in his application for discharge as receiver. On October 14, 1939, Charles H. Albers, as receiver for the Lincoln Trust & Savings Bank, filed a written motion to strike the petition and motion of Abraham Jacobs. On December 26, 1939, the court entered an order striking from the files the petition and motion of Abraham Jacobs, to reverse which this appeal is prosecuted.

The first two points urged by petitioner Jacobs are that (1) a motion in the nature of a writ of error coram nobis may be brought to correct errors of fact committed in a court of record within five years after rendition of final judgment, and (2) that failure to give proper notice of proceedings is an error of fact not appearing on the face of the record sufficient to sustain a motion in the nature of a writ of error coram nobis. Plaintiff does not challenge the law as announced in these two points. The third point presented is that "the relationship of attorney and client between Frank F. McGuinn and Abraham Jacobs, had terminated on January 8, 1936, so that service of notice upon Frank F. McGuinn on May 18, 1937, was not binding upon Abraham Jacobs." Under this point petitioner argues that on the entry of the deficiency decree the relationship of attorney and client ceased to exist. He also argues that the relationship of attorney and client terminated at the expiration of the period of redemption. It will be observed that the notice of the presentation of the final account and report was served on attorney Frank F. McGuinn 28 days after the expiration of the statutory period of redemption. It is difficult to lay down a general rule as to when the relationship of attorney and client ceases. Determination of this question depends upon the facts and circumstances of each case. It may be said that the relationship terminates when the object for which the attorney was employed has been accomplished. Petitioner was required to take notice of the law of this state that it is the duty of the receiver to surrender possession at the expira-

present a bill, then, accounts and accounts report are required in
his application for discharge as receiver. On January 24, 1935,
James E. Smith, as trustee for the estate of William Jacobson,
filed a written motion to strike the petition and motion of William
Jacobson. On December 22, 1934, the court entered an order striking
from the file the petition and motion of William Jacobson, and
reverse when this appeal is presented.

The first two points urged by William Jacobson are that
(1) a motion is the nature of a writ of certiorari and the
court is correct in its order of that nature in a writ of certiorari
within five years after rendition of final judgment, and (2) that
failure to give effect to the petition is an error of fact
not appearing on the face of the record sufficient to sustain a
motion in the nature of a writ of certiorari. Ex parte Smith.
Notwithstanding the law as announced in these two points, the court
points out in its opinion that "the relationship of attorney and client
between Frank T. Nelson and William Jacobson, had terminated on
January 8, 1935, so that action of motion upon Frank T. Nelson on
May 18, 1935, was not binding upon William Jacobson." Under this ruling
the court says that on the day of the petition Smith the
relationship of attorney and client ceased to exist. He also argues
that the relationship of attorney and client terminated at the expiration
of the period of redemption. It will be observed that the
notice of the presentation of the final account and report was served
on attorney Frank T. Nelson 15 days after the expiration of the
statutory period of redemption. It is difficult to lay down a
general rule as to when the relationship of attorney and client ceases.
Determination of this question depends upon the facts and circumstances
of each case. It may be said that the relationship terminates when
the object for which the attorney was employed has been accomplished.
Whether the parties to the motion of the law of this state that
it is the duty of the receiver to continue possession of the estate

tion of the period of redemption. The interest of the defendant in the litigation continued throughout the redemption period and until the receiver should account. Petitioner was interested in seeing to the application of net rents and in claiming any surplus which might remain. As a tenant he was also interested in the termination of his tenancy under the receiver, which could not continue beyond the period of redemption. It is a matter of common knowledge that the practice in the courts of this county sanctions the serving of notice of the application for the approval of receivers' current and final accounts, on the attorneys of record. The interest of the client in the subject matter does not end with the entry of the decree or the confirmation of the sale, but it continues until the receiver has been discharged. It is interesting to note also that the petition filed herein does not say that Mr. McGinn, the attorney, failed to advise him (petitioner) that notice had been served. It is remarkable that although petitioner knew or should have known that under the usual course of procedure the final report and account of the receiver would be presented shortly after March 22, 1937, when the period of redemption would expire, he nevertheless took no action to have the order (of June 4, 1937), approving the account, set aside until October 10, 1939.

Finally, petitioner insists that "the fraudulent concealment of pertinent facts by the receiver appointed by the court, in his account and report concerning property entrusted to him, is an error of fact not appearing of record within the meaning of Sec. 72; that the trial court being a court of equity had the power to vacate the order entered in reliance of fraudulent representations of an officer of court, and should have vacated said order and granted the relief prayed for". It will be noted that the petition does not directly charge that the receiver Hoeder had notice or knowledge of the accident. The petition does assert that "notwithstanding the fact the hereinabove stated accident to your petitioner occurred

sign of the period of redemption. The interest of the redemption
in the light of the provisions of the law is that the redemption
will be effected by the redemption of the property. The redemption
being to the satisfaction of the law, and in the interest of the
which might result. As a result he was also interested in the
redemption of his property under the law, which would be
continued beyond the period of redemption. It is a matter of course
knowledge that the redemption in the course of the redemption
the saving of notice of the redemption for the redemption of
redemption, interest and final redemption, on the redemption of the
The interest of the law in the redemption of the property and the
the entry of the law on the redemption of the law, and it
continues until the redemption has been effected. It is interesting
to note also that the redemption of the law is not only a
Mr. Mullins, the attorney, failed to advise him (petitioner) that
notice had been served. It is possible that the redemption of the
law would be effected by the redemption of the law, and the
the law report and account of the redemption of the law, and the
shortly after March 22, 1937, when the period of redemption would
expire, he nevertheless took no action to have the right of redemption
1937), regarding the account, and made until October 10, 1938.
Finally, petitioner insists that "the redemption of the
ment of redemption made by the redemption of the law, and the
his account and report concerning the redemption of the law, and the
error of fact not appearing of record within the meaning of law. It
that the law is not a matter of fact, and the law is not a matter
the order entered in reliance of the redemption of the law, and the
effect of the law, and would have been voided and annulled the
relief prayed for. It will be noted that the petition does not
insist upon the law, and the law is not a matter of fact, and the
the redemption. The petition does insist that "notwithstanding the
that the redemption of the law is not a matter of fact, and the law

during the tenure of the said Frank F. Woeder, as receiver, and notwithstanding the fact that the said Frank F. Woeder, receiver, had notice and knowledge of said accident, the said Frank F. Woeder did, with intent to conceal from the court the herein described negligent act, fraudulently and wilfully, wholly fail to account and report said occurrence to this honorable court". This amounts to an inference that the receiver did have notice or knowledge of the accident. The petition, however, is silent as to when or in what manner the receiver acquired knowledge of the accident, nor is there any allegation in the petition, or elsewhere in the record, that the receiver failed to use due care in the selection of Leo Keroski for the work of exterminating vermin from the building, or that the latter and his helper were not skilled, experienced and fit persons to perform that particular work. We are of the opinion that the petition does not set forth valid ground for relief under Section 73 of the Civil Practice Act. For the reasons stated, the order of the Circuit Court of Cook County entered December 28, 1939, is affirmed.

ORDER AFFIRMED.

HEBEL, P.J. CONCURS, and
DENIS E. SULLIVAN, J. DISSENTS.

During the course of the said trial, the witness, the
notwithstanding the fact that the said witness, the
and notice and knowledge of this accident, the said witness, the
did, with intent to conceal from the court the facts disclosed
negligent act, recklessness and willfully, wholly fail to comply
and report said occurrences to this honorable court. This amounts
to an intention that the witness will not testify to the facts of
the accident. The witness, however, is silent as to what he is
what manner the witness reported the facts of the accident, nor
is there any allegation in the petition, or elsewhere in the record,
that the witness failed to use due care in the discovery of the
Katoch for the work of investigation, versus from the building, or
that the father and his father were not called, investigated and
the witness to perform that particular work. He was of the opinion
that the witness had not met with with some one called, and
Section 78 of the Civil Procedure Code, and the witness stated, the
fact of the witness of the witness, and the witness, and the
is attached.

ORDER: NISI.

RECEIVED, 11.11.1911, and
FILED, 11.11.1911.

41366

BERNICE GROSSMAN,

v.

Appellee,

INTERLOCUTORY DECREE

FROM SUPERIOR COURT

HERMAN GROSSMAN,

Appellant.

JUNE QUINCY.

307 I.A. 246

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On October 7, 1939, plaintiff filed her complaint in the Superior Court of Cook County and therein represented that the parties were married on July 28, 1938, that she conducted herself as a good and dutiful wife; that on March 3, 1939, without any provocation or justification, defendant abandoned her; that she lived separate and apart from him without any fault on her part; and she prayed for an accounting, for temporary alimony, for an injunction and for separate maintenance. On October 9, 1939, the court granted a temporary injunction. On October 20, 1939, the court granted a further injunction. These orders were granted without previous notice to the defendant and the giving of a bond was excused. After the issuance of the injunctions, the defendant filed a motion to strike the complaint, vacate the orders for the writs of injunction and to dissolve the injunctions. The court did not comply with the request of the defendant for an immediate disposition of the motion and defendant appealed from the interlocutory orders granting the temporary injunctions. Our opinion, reported in Grossman v. Grossman, 304 Ill. App. 807, filed April 10, 1940, agreed with the defendant that plaintiff did not make a showing sufficient to warrant the chancellor in granting the injunctions without notice, and that she also failed to make a showing sufficient to authorize the chancellor to excuse the giving of a bond. We decided, however, that the motion did not raise any point that the injunctive orders were improperly issued without notice, nor that the court improperly waived the giving of a bond. We held that the defendant having waived the points that the injunctions were improperly issued without notice and without bond,

could not be heard to object on such grounds. On May 10, 1940, (after our mandate was filed) defendant was granted leave to file an amended motion to vacate the injunctive orders. This amended motion urges, for the first time, the points that the injunctions were improperly issued without notice and that the giving of a bond was improperly excused. On the same day the court entered an order that the amended motion to vacate and set aside the injunctive orders, be dismissed, and that the relief therein requested be denied, to reverse which this appeal is prosecuted.

This appeal again raises the two points which were urged in the previous appeal and which we decided adversely to the defendant. We then ruled that he waived these points by his failure to raise them in his motion. By the amended motion he does raise the two points. However, it is obvious that having waived the points, he cannot now raise them. Our view is that the previous opinion disposed of the two points that are urged in the instant appeal. Prior to filing her brief, plaintiff filed a motion to dismiss the appeal. One of the grounds asserted therein is that our previous opinion determined that the defendant had waived the questions now presented by this appeal. We took this motion with the case.

Having read the abstracts and briefs, we are now of the opinion that the motion to dismiss the appeal should be allowed. Because of the views expressed, the appeal is dismissed at defendant's costs.

APPEAL DISMISSED.

HEBEL, F.J. CONCURS, and
DENIS E. SULLIVAN, J. DISSENTS.

would not be bound to object on such grounds. On May 1st 1944,
(after our meeting with the (first) defendant was removed from the
an amended motion to dismiss the indictment. This motion
motion argues, for the first time, that unless the indictment
were properly issued without notice and that the giving of a
notice was improperly refused. On the same day the court entered
an order that the amended motion be granted and set aside the
information entered. He dismissed, and that the relief sought
should be granted. It is stated that this order is granted.
This appeal arises from the reasons which were stated
in the previous appeal and which he decided adversely to the
defendant. He then ruled that he would grant relief to the
to raise them in his motion. By one amendment motion he then raised
the two points. However, it is obvious that neither motion the
points, he cannot now raise them. And when in fact the previous
motion disposed of the two points that are urged in the instant
appeal. After so ruling he could not later amend a motion to
dismiss the appeal. One of the grounds advanced herein is that
our previous opinion determined that the defendant had waived the
question now presented by this appeal. We took this action with
the case.

Having read the statement and briefs, we are not of the
opinion that the motion to dismiss the appeal should be allowed.
Because of the views expressed, the appeal is dismissed as
defendant's costs.

THOMAS H. HARRIS.

THOMAS H. HARRIS, JR.
J. J. O'CONNOR, JR.
J. J. O'CONNOR, JR.

41114

HERRING-HALL-MERVIN SAFE COMPANY,
a corporation,

v.

PAUL KORSHAK, LESTER KORSHAK, DAVID
HARRIS, LIPMAN HARRIS, doing
business as CHICAGO STATE PAWNERS,
LTD.,

Appellants.

307 I.A. 246²

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff Herring-Hall-Mervin Safe Company, a corporation, brought suit against Paul Korshak, Lester Korshak, David Harris, Lipman Harris, doing business as Chicago State Pawnners Ltd., to recover the balance of \$200 which plaintiff alleges is due it on the purchase price of a safe sold and delivered by plaintiff to defendants. A trial was had in the Municipal Court which resulted in a finding and judgment being entered in favor of plaintiff for \$200, and costs against the defendants on their counter-claim, from which finding and judgment defendants bring this appeal.

No question is raised on the pleadings.

The evidence shows that the defendants wanted to purchase a new safe and called at the place of business of the plaintiff; that defendants selected one of the safes which was later delivered to them and a contract was entered into between the parties; that the price of the safe was \$400 and defendants paid \$100 and were allowed a credit of \$100 on an old safe which they traded in at the time of purchase which was equivalent to \$200, for which they received credit, and that the balance then remaining due was \$200, for the payment of which suit was instituted.

It further appears from the evidence that after the safe was received by defendants they requested that plaintiff take the safe back as it was too heavy for their use; that plaintiff refused to take the safe back and defendants continued to use the safe and were still using it up to the time of the trial.

2
No question of law is involved in this case, but it is mostly one of fact.

Inasmuch as defendants bought the safe, paid part of the purchase price, accepted the safe when delivered and have not returned it to plaintiff and no fraud is alleged or proved, we think the trial court was justified in entering judgment in favor of plaintiff for \$200, with costs against defendants.

For the reasons herein given the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND BURKE, J. CONCUR.

It is not clear how the authors intend to use the data.

^c Post 94 and 95 data

William Wills, a member of the first expedition, was killed.

[illegible]

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Let the volume be V and the temperature be T .

• *Journal of the Royal Society of Medicine*

THE UNIVERSITY OF CHICAGO

41319

ANNA KOVAE,

MODERN MUTUAL INSURANCE COMPANY,
a corporation,

Appellant.

MUNICIPAL COURT

OF CHICAGO.

307 I.A. 247

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

This suit was brought by Anna Kovae on an insurance policy issued by Modern Mutual Insurance Company on the life of Peter Kovae who later died on September 27, 1934, in which policy Anna Kovae was named as beneficiary. The policy was for \$1,000 and plaintiff alleges that defendant refuses to pay same.

The defense interposed to the suit was that the policy lapsed because of non-payment of premiums and that the policy was not in force at the time of the death of Peter Kovae; that plaintiff had assigned her interest in the policy and has no further interest therein; that the policy had been issued through misstatements fraudulently made by the insured in order to obtain said policy, and that the maximum amount to be paid on said policy is for \$330.

Plaintiff filed an affidavit for a summary judgment under Rule 111 of the Civil Practice Act of the Municipal Court.

Interrogatories were filed with plaintiff's claim. Defendant's answer thereto stated that if there was anything due it was for only \$330, but that they had a defense regarding said claim, but it does not state what constituted such defense. The defense as it appears in the record before us is not sufficient, and that which does appear consists of mere conclusions.

From a review of the record before us, we think the trial court was justified in finding for the plaintiff in the sum of \$330 and costs. Therefore, the judgment of the Municipal Court is hereby affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND BURKE, J. CONCUR.

RECEIVED

308 I.A. 247

This suit was brought by Mrs. Jones on an insurance policy issued by National Mutual Insurance Company on the 15th of October 1930 and later died on September 17, 1930, in which policy Mrs. Jones was named as beneficiary. The policy was for \$10,000 and plaintiff alleges that defendant refused to pay same.

The defense insisted that the suit was that the policy was lapsed because of non-payment of premiums and that the policy was not in force at the time of the death of Peter Jones; that plaintiff had assigned her interest in the policy and was no longer interested therein; that the policy was never issued because she stated that she fraudulently made up the insured in order to obtain said policy, and that the savings amount to be paid on said policy is for \$250.

Plaintiff filed an affidavit for a summary judgment which sets all of the civil practice out of the judicial court.

Investigations were filed with plaintiff's claim.

Defendant's answer thereto states that it knows nothing and it was for only \$250, but that they had a claim regarding said claim, but it does not state what constituted such claim. The defense as it appears in the record before me is not sufficient and that which does appear consists of mere conclusions.

From a review of the record before me, we think the trial court was justified in finding for the plaintiff in the sum of \$250 and costs. Therefore, the judgment of the judicial court is hereby affirmed.

41164

IN THE MATTER OF THE ESTATE OF
ELIZABETH PLUMMER, DECEASED.

WALTER PLUMMER,

Appellant,

v.

CHARLES PLUMMER,

Appellee.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

307 I.A. 378

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Walter Plummer, hereinafter referred to as contestant, appeals from an order of the Circuit court admitting to probate a document purporting to be the last will and testament of his mother, Elizabeth Plummer, deceased.

The will was executed June 6, 1939. Elizabeth Plummer, the testatrix, died June 24, 1939, following a severe illness attended by various complications. Dr. Joseph Sodaro of Forest Park, attended her May 21, 1931, and testified that when he was introduced to her she did not respond and was reluctant to talk to him or explain her complaints. Upon examining her, he found a cancer of the uterus and a diseased liver. She was very emaciated and the physician described her as the "thinnest patient I had ever seen," all "skin and bones." Her principal ailment was an acute diabetic condition. The physician suggested insulin treatments and a nurse, and based upon reasonable medical certainty it was his opinion that she would live from one to six weeks. He said that the diabetic condition in which he found Mrs. Plummer would affect the mind and put the patient in a state of coma or near coma, that "as one reaches the state of coma, it affects the mind. They can do things that they don't know they are doing. Their state of mind is cloudy and they cannot think clearly. A person in the condition I found Mrs. Plummer * * * was not in condition to transact business. I saw her the next time June 12, 1939,

IN THE MATTER OF THE ESTATE OF
ELIZABETH FINNEN, DECEASED.
SARAH FINNEN, Plaintiff,
vs.
CHARLES FINNEN, Defendant,
Appellee.

APPEAL FROM THE CIRCUIT COURT,
COUNTY OF WISCONSIN.

307 I.A. 378

MR. PRESIDING JUSTICE PRINCE DELIVERED THE OPINION OF THE COURT.
SARAH FINNEN, Plaintiff, submitted evidence to establish her
appeals from an order of the Circuit Court relating to probate
a document purporting to be the last will and testament of her
mother, ELIZABETH FINNEN, deceased.
The will was executed June 6, 1932. ELIZABETH FINNEN,
the testatrix, died June 24, 1932, leaving a severe illness
attended by various complications. Dr. Joseph Sodaro of Forest
Park, attended her May 31, 1931, and testified that when he was
introduced to her she did not respond and was reluctant to talk
to him or explain her complaints. Upon examining her, he found
a cancer of the uterus and a diseased liver. She was very
emaciated and the physician described her as the "thinest patient
I had ever seen," all "skin and bones." Her principal ailment was
an acute diabetic condition. The physician suggested insulin treat-
ments and a nurse, and based upon reasonable medical certainty it
was his opinion that she would live from one to six weeks. He
said that the diabetic condition in which he found Mrs. FINNEN
would affect the mind and put the patient in a state of coma or
near coma, that "as one reaches the state of coma, it affects the
mind. They can do things that they don't know they are doing.
Their state of mind is cloudy and they cannot think clearly. A
person in the condition I found Mrs. FINNEN * * * was not in condi-
tion to execute a will. I saw her the next time June 12, 1932,

at her home. They had gotten a nurse. She was propped up in bed. It seemed more difficult for her to breathe. I got no response to my questions in any sensible way. Her condition was worse. I saw her again on June 16th. Her condition was worse and she was in a semi-comatose condition. From the condition that I found Mrs. Plummer in on May 21, 1939, and on June 12, 1939, she was in no condition to have executed a will on June 6, 1939, and be of sound and disposing mind."

When the will was executed the testatrix had become so ill that because of her diabetic condition she was unable to see. The will was drawn and executed under circumstances described by Sylvia Barker, one of the attesting witnesses, as follows:

"I talked with her (the testatrix) and Charlie (the proponent of the will, who is named as executor therein, one of her sons) the same day. At 2.00 P.M. of the same day. Charlie and I were present when I got in there. Mrs. Plummer was mumbling and mumbling, and talking about money and everything; that Walter, Tess and George (her other children) had money borrowed out, and ~~she~~ was saying she asked about the money and everything between the two of them, and then they were talking about money they had, and the different amounts, and then Charlie told his mother * * * to make out a will, and he told her that she was to leave five hundred to Walter and George, and the rest to himself. We stayed there a few minutes and went back to my home. * * * When I got there Charlie said, 'How are you going to write it?' I said 'Charlie, I don't know how she wants one thing.' 'Now', I said, 'your mother ought to get another lawyer,' and he jumped up and he called Siegler (attorney for proponent) and he told Mr. Siegler that the will had to be drawn up right away, that his mother was going to die any minute. He was at my house and I was going to typewrite it. * * * Charlie talked to Mr. Siegler on the phone, and he took notes while talking there, and he told me, 'You want to take down on the typewriter what he had taken from Mr. Siegler on the telephone. I never spoke to Mr. Siegler on the telephone in my life.

"Q. After the will was written up, you took it back to Mr. Plummer's house, did you? A. No, I did not. Charlie did. I was with Charlie. We went into the room and she signed it. * * *

"Q. Who asked Mrs. Plummer to sign the will?

"A. Charlie did. As we were going into Mrs. Plummer's house, prior to signing the will, when we got out of the car, Charlie said, 'If Walter is around, just change the subject about the will, because Walter is trying to get a deed from my mother and I got to get her name on the will.' 'She is going to leave \$500 to Walter and George and all the rest to me.' He said 'Why, it would be a crime for her to die without a will.' Charlie put the pen in her hands. At the time Charlie asked her to sign the will, Mrs. Plummer drew back and did not want to sign it and

at her home. They had gotten a nurse. She was dropped up in bed. It seemed more difficult for her to breathe. I got no response to my questions in any sensible way. Her condition was worse. I saw her again on June 18th. Her condition was worse and she was in a semi-comatose condition. From the condition that I found Mrs. Flanner in on May 21, 1939, and on June 18, 1939, she was in no condition to have executed a will on June 8, 1939, and

Charlie said, 'Oh, ma, come on.' Then Mrs. Davies (the nurse, who was another attesting witness) and Charlie propped her up in bed. Charlie put something under the will and held it up, and Helen spelled out the letters. Then when it was over, she said that the 'E' had been left out and the 'T' was not crossed and Helen then put them in there. Charlie and Mrs. Davies held her up from the bed. One was on one side and one on the other. Her condition was dreadful. I thought she would die any minute. She was all emaciated. She was like a bag of bones. There was nothing to her. She did not respond to questions or things that were said. When Charlie said I got the will ready, she drew back and did not want to sign it. Then Charlie said, Oh, ma, and then they pulled her up and Charlie put it under her. * * * When they propped her up and signed the will, I don't think she knew what she was doing. I don't think she realized everything that was going on. I did not have any other conversation with her. She was mixed what was paid up all around and the money she used. And Charlie was prompting her and telling her. I talked very little to Mrs. Plummer. Charlie was in and out prompting her. She said she intended to make me executor, and I said, 'No, I would not do it.' * * * She kept on saying what money she had and what money Walter and Tessie owed. It was unintelligible. I noticed the way she kept mumbling over and over. She certainly was not straight in her mind about it, because she did not know whether they had paid it back or not. She kept mumbling all the time and repeating over and over about her money they had. Walter, George and Tessie.

"The Court: Did Mrs. Plummer ask you to sign the will as a witness? A. No.

"Did she ask Mrs. Davies? A. No.

"I typewrote the will * * * not from my own knowledge, but was given to me by Charlie Plummer."

The other attesting witness, Helen Davies, was the nurse on duty. The salient portions of her testimony relating to the execution of the will are:

"Q. Did you believe her to be of sound mind and disposing memory at the time she signed that instrument?

"A. She knew she was making a will.

"Q. Did you believe at the time she put her name down there she was of sound and disposing mind and memory?

"A. I would not know any other answer but how I expect she knew she was signing the will. She told me it was her will. * * * on the day the will was signed Mrs. Plummer was very sick, she was emaciated, repeatedly sick to her stomach and in a general bad condition.

"Mr. Guerine: Q. What was her mental condition and how did she act?

"A. She was confused and worried and expressed her worry in words to me. She was afraid somebody was going to steal her money. She said that to me. She was unable to tell the difference between a one dollar bill and a five dollar bill. She would whisper to me and ask me to help her take care of her money. When I went into the room, Charlie would stop

talking. They would not talk in front of me. On the day the will was signed she was confused all the time, every day. She mumbled at times.

"Q. Isn't it a fact Mrs. Davies, that she drew back and acted as if she did not want to sign it? A. I don't know. It could be interpreted that way. She was confused and worried about everything. * * * Charlie put the will underneath her and put the pen in her hand. Either I or Charlie spelled the letters and told her what to write. I spelled them out, if I remember correctly. After the will was signed, Charlie swore me to secrecy and not to tell anybody. * * * On the day the will was signed, I did not hear her discuss business and carry on a rational conversation. She was in a daze part of the time."

Both Sylvia Barker and Helen Davies had subscribed as attesting witnesses to the will. The attestation clause is in the regular statutory form, and includes the statement that at the time of the execution of the will the witnesses believed the testatrix to be of sound and disposing mind and memory. Upon trial in the Circuit court, however, Miss Barker entirely repudiated her opinion and gave her reasons therefor, as hereinbefore set forth, and Mrs. Davies, while testifying that she believed Mrs. Plummer knew she was executing a will, stated that Mrs. Plummer was seriously ill, hazy and confused, and at best her testimony indicates that she entertained considerable doubt as to the testamentary capacity of the testatrix.

There is substantially no dispute in the evidence. Mrs. Plummer was desperately ill and in the last stages of diabetes, besides other organic complications. Her attending physician was of the opinion, from examinations made shortly before and after the execution of the will, that the diabetic condition in which he found her had affected her mind, that she was in a state of coma, or near coma, that her mind was cloudy and hazy, and that she was not competent to transact business or to execute a will on June 6.

Where the attestation clause of a will is in due form and the will bears the genuine signature of the testatrix and the subscribing witnesses, it is prima facie evidence of the due execution of the will. (Brelie v. Wilke, 373 Ill. 409.) But this prima facie evidence may be overcome by the testimony of witnesses. In this proceeding the attesting witnesses themselves rebutted the

...will was signed she was conscious all the time, every day. She
mumbled at times.

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and asked as if she did not want to sign it? A. I don't know,
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time of the execution of the will the witnesses believed the

testatrix to be of sound and disposing mind and memory. Upon

her opinion and gave her reasons therefor, as hereinafter set forth,

and Mrs. Davies, while testifying that she believed Mrs. Plimmer

know she was executing a will, stated that Mrs. Plimmer was seriously

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the testatrix.

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tion of the will. (Estate of Plimmer, 171 Ill. 409.) But this prima

facie evidence may be overcome by the testimony of witnesses. In

this proceeding the attending witnesses conclusively rebutted the

prima facie case. There was other competent evidence indicating that Mrs. Plummer was approaching a state of coma, that her mind was clouded and hazy and that she had no clear conception of the disposition of her property. The record does not indicate that the will was read to her and it is clear that she did not and could not read it herself. Witnesses for proponent testified generally to the effect that they had known her for many years, had seen her twenty or thirty days before the will was executed, and that she appeared to be of sound mind. But none of these witnesses had seen her at or about June 6, after she had become permanently confined to bed. While it is true that where a witness who has subscribed to a will, stating in the attestation clause all the facts required for a proper attesting of the will, testifies on the hearing to a contrary state of facts, his or her testimony should be closely scrutinized; nevertheless, the evidence in this case relative to the circumstances under which the will was made, and the physical and mental condition of the testatrix, overwhelmingly demonstrates that she was physically and mentally unable to make a will. In fact, it appears from the evidence that the instrument was prepared under the direction of proponent, who was named as executor in the will and the principal beneficiary thereunder. He procured the witnesses and requested them to sign as attesting witnesses, under circumstances indicating that **it** was his will rather than hers.

Section 2 (chap. 148, Ill. Rev. Stats. 1939) on Wills, provides that before a will is entitled to probate four things must occur, namely: the will must be in writing and signed by the testator or testatrix, or by some one under her direction; it must be attested by two or more credible witnesses; two witnesses must prove that they saw the testatrix sign the will in their presence, or that she acknowledged the same to be her act and deed; and that two or more witnesses must swear that they believed the testatrix to be of sound mind and memory at the time of the signing. The last requirement is entirely absent in this proceeding. Neither of the attesting witnesses was of the opinion that the testatrix was of

...that Mrs. ... was approaching a state of coma, that her mind was clouded and hazy and that she had no clear conception of the disposition of her property. The record does not indicate that the will was read to her and it is clear that she did not and could not read it herself. Witnesses for proponent testified generally to the effect that they had known her for many years, had seen her twenty or thirty days before the will was executed, and that she appeared to be of sound mind. But none of these witnesses had seen her at or about June 6, after she had become permanently confined to bed. While it is true that where a witness who has subscribed to a will, stating in the attestation clause all the facts required for a proper attesting of the will, testifies on the hearing to a contrary state of facts, his or her testimony should be closely scrutinized; nevertheless, the evidence in this case relative to the circumstances under which the will was made, and the physical and mental condition of the testatrix, overwhelmingly demonstrated that she was physically and mentally unable to make a will. In fact, it appears from the evidence that the instrument was prepared under the direction of proponent, who was named as executor in the will and the principal beneficiary thereunder. He procured the witnesses and requested them to sign as attesting witnesses, under circumstances indicating that it was his will rather than hers.

Section 2 (chap. 143, Ill. Rev. Stat. 1937) on Wills, provides that before a will is admitted to probate four things must occur, namely: the will must be in writing and signed by the testator or testatrix, or by some one under her direction; it must be attested by two or more credible witnesses; two witnesses must prove that they saw the testatrix sign the will in their presence, or that she acknowledged the same to be her act and deed; and that two or more witnesses must swear that they believed the testatrix to be of sound mind and memory at the time of the signing. The last requirement is entirely absent in this proceeding. Neither of the attesting witnesses was of the opinion that the testatrix was

sound mind and memory when she made the will, and under all the circumstances of this case we think it was error for the Circuit court to admit it to probate. Therefore, the order of the Circuit court is reversed and the cause is remanded with directions to enter an order denying the admission to probate of the alleged will.

ORDER REVERSED AND CAUSE REMANDED
WITH DIRECTIONS.

Scanlan and Sullivan, JJ., concur.

...and the ...
...of the ...
...is ...
...and the ...
...the ...
...will.

ORDER REVERSED AND CASE REMANDED
WITH DIRECTIONS.

Reversed and remanded, July 12, 1904.

41175

ALEX W. SCHULTZ (Plaintiff
and counter defendant below),
Appellant,

v.

SADIE K. SCHULTZ (Defendant
and counterclaimant below),
Appellee.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

307 I.A. 378²

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff, Alex W. Schultz, filed a bill for divorce against his wife, Sadie K. Schultz, charging specifically several acts of cruelty. Defendant thereupon filed a counterclaim for separate maintenance, also charging cruelty, and alleging that plaintiff had left her April 20, 1938, without any cause, ground or provocation, refusing to return and cohabit with her, although requested to do so. A full hearing was had before the chancellor, resulting in the dismissal of plaintiff's bill and the entry of a decree in favor of defendant, awarding her custody of a minor daughter born of said marriage and \$31 a week for separate maintenance, as well as attorneys' fees and costs of the proceeding.

The Schultzes were married in June, 1919, and resided together from that time until April 20, 1938, except for a short period of separation in 1925. For some time prior to the final separation they occupied separate living quarters under the same roof and did not cohabit as husband and wife. Mr. Schultz was engaged in the scrap iron business, and his older daughter, Esther, who was 19 years of age at the time of the trial, was employed at his place of business. The younger daughter, Miriam, who was 16 years of age at the time of the trial, attended school.

The specific acts of cruelty charged by plaintiff are alleged to have occurred May 15, 1937, July 18, 1937, and April 29, 1938. Plaintiff testified that on the first of these dates defendant struck him on the head with both hands, from which he sustained

ALAN W. SCHULTE (Plaintiff)
and GEORGE DELANEY (Defendant)
vs.
RABIN K. SCHULTE (Defendant)
and GEORGE DELANEY (Defendant)
Appellants.

FILED FOR RECORDING

8071A.458

MR. FRANKLIN THURMAN DELANEY, THE ATTORNEY OF THE DEFENDANT,

Plaintiff, Alex W. Schulte, filed a bill for divorce

against his wife, Sadie K. Schulte, charging specifically several

acts of cruelty. Defendant thereupon filed a counterclaim for

separate maintenance, also charging cruelty, and alleging that

plaintiff had left her April 30, 1938, without any cause, ground

or provocation, refusing to return and cohabit with her, although

requested to do so. A full hearing was had before the chancellor,

resulting in the dismissal of plaintiff's bill and the entry of a

decree in favor of defendant, awarding her custody of a minor

daughter born of said marriage and \$11 a week for separate maintenance,

as well as attorneys' fees and costs of the proceeding.

The Schultes were married in June, 1919, and resided

together from that time until April 30, 1938, except for a short

period of separation in 1925. For some time prior to the final

separation they occupied separate living quarters under the same roof

and did not cohabit as husband and wife. Mr. Schulte was engaged in

the scrap iron business, and his older daughter, Esther, who was 19

years of age at the time of the trial, was employed at his place of

business. The younger daughter, Miriam, who was 16 years of age at

the time of the trial, attended school.

The specific acts of cruelty charged by plaintiff are

alleged to have occurred May 12, 1937, July 18, 1937, and April 29,

1938. Plaintiff testified that on the first of these dates defendant

struck him on the head with both hands, from which he sustained

bruises. Dr. Billow, the family physician, offered corroborating testimony for this act of cruelty, testifying that when he was called in May, 1937, Mrs. Schultz was very nervous and sick in bed and from the conversation and history it appeared that Mrs. Schultz, in a moment of hysteria, had wanted to commit suicide and exert violence against her husband. He said that Mr. Schultz's head was a "little bit scratched," and that he administered morphine by hypodermic to quiet Mrs. Schultz, and continued to administer sedatives for several days thereafter until the parties stopped calling him.

Ben Friedman, another witness called on behalf of plaintiff, had known the parties for upward of twenty-five years, and had, together with his wife, visited their home many times. Friedman testified that Mrs. Schultz indulged in a great deal of argument with her husband and that he had a conversation with her about their domestic affairs in South Haven, Michigan, in July, 1937. While there, he noticed a mark on Mr. Schultz's forehead, and upon inquiry was told by Mr. Schultz that his wife had struck him.

Ben Schiffman, another witness, testified that he was not well acquainted with Mrs. Schultz, but had known her husband for about ten years; that in March, 1938, he visited Schultz's place of business and as he entered the office he heard an argument attended by considerable "hollering and talking real loud;" that as he was about to leave the office Mrs. Schultz raised both hands and struck her husband in the face. Sam Schultz, plaintiff's brother, testified generally that Mr. Schultz was a good husband, but that his wife did not treat him well; that March 25, 1938, she came into Schultz's place of business and asked for some money and refused to leave "until she got the money," and struck him over the head; that several weeks later in April, 1938, Mrs. Schultz came to the shop and again asked for money, requesting \$200. When Mr. Schultz told her that he did not have it she "grabbed a piece of iron off the floor and hit him on the

Dr. Bellow, the family physician, offered corroborating testimony for this act of cruelty, testifying that when he was called in May, 1937, Mrs. Schultz was very nervous and sick in bed and from the conversation and history it appeared that Mrs. Schultz, in a moment of hysteria, had wanted to commit suicide and exert violence against her husband. He said that Mr. Schultz's head was "little bit scratched," and that he administered morphine by hypodermic to quiet Mrs. Schultz, and continued to administer sedatives for several days thereafter until the parties stopped calling him.

Ben Friedman, another witness called on behalf of plaintiff, had known the parties for upward of twenty-five years, and had, together with his wife, visited their home many times. Friedman testified that Mrs. Schultz indulged in a great deal of argument with her husband and that he had a conversation with her about their domestic affairs in South Haven, Michigan, in July, 1937. While there, he noticed a mark on Mr. Schultz's forehead, and upon inquiry was told by Mr. Schultz that his wife had struck him.

Ben Schiffman, another witness, testified that he was not well acquainted with Mrs. Schultz, but had known her husband for about ten years; that in March, 1938, he visited Schultz's place of business and as he entered the office he heard an argument attended by considerable "hollering and talking real loud"; that as he was about to leave the office Mrs. Schultz raised both hands and struck her husband in the face. Mrs. Schultz's brother, testified emphatically that Mr. Schultz was a good husband, but that his wife did not treat him well; that March 17, 1938, she came into Schultz's place of business and asked for some money and refused to leave "until she got the money," and struck him over the head; that several weeks later in April, 1938, Mrs. Schultz came to the shop and requested for money, requesting \$200. When Mr. Schultz told her that he did not have it she "grabbed a piece of iron off the floor and hit him on the

shoulder; that his shoulder was bruised; that when he turned to call the police she walked out, and practically ran away."

On behalf of defendant and in support of her charges of cruelty under the cross bill, Al J. Schultz testified that he had appeared in court under subpoena; that he was a cousin of plaintiff, and had been engaged in business with him from 1927 to 1930, and from 1932 until 1938; that from his observation Mrs. Schultz did not treat her husband "any different than any wife treats her husband. He had an awful bad temper. I never saw an exhibition of his temper at any of my visits at his home, but saw it once at the shop." He had seen Mrs. Schultz in the shop on only one occasion, in March, 1938. The parties were still living together at the time. Mrs. Schultz came in and asked for \$200. The witness testified that Mr. Schultz "got hot and hit her and she fell down. Abe Altman grabbed him and pulled him away from her. She picked herself up and walked away. She did not hit him on that occasion. I never saw her in the shop again at any time."

It appeared from evidence adduced upon the hearing that Mr. Schultz was on very friendly terms with a Mrs. Ross, mother of three children, who was separated from her husband. Mrs. Gussie Goldstein, called on behalf of defendant, testified that she had known the Schultzes for about ten years, had visited at their home and had met them at social functions and at summer resorts on several occasions, and that Mrs. Schultz had always treated her husband with consideration. She said that the last time she saw Mr. Schultz was in 1938, in South Haven; that he had a woman in his car and when the witness inquired what had become of his family he said he had filed a bill for divorce; that in July, 1939, she saw Mr. Schultz sitting on a bench on the pier with another woman, "with their heads together."

The older daughter, Esther, likewise appeared in court in response to a subpoena. With reference to the occasion in May, 1937, she testified that her father and mother had had an argument, and

shoulder; that his shoulder was bruised; that when he turned to call the police she walked out, and practically ran away."

On behalf of defendant and in support of her charges of cruelty under the cross bill, Al J. Schmitz testified that he had appeared in court under subpoena; that he was a cousin of plaintiff, and had been engaged in business with him from 1927 to 1930, and from 1932 until 1938; that from his observation Mrs. Schmitz did not treat her husband "any different than any wife treats her husband. He had an awful bad temper. I never saw an exhibition of his temper at any of my visits at his home, but saw it once at the shop." He had seen Mrs. Schmitz in the shop on only one occasion, in March, 1938. The parties were still living together at the time. Mrs. Schmitz came in and asked for \$200. The witness testified that Mr. Schmitz "got hot and hit her and she fell down. The witness grabbed him and pulled him away from her. She picked herself up and walked away. She did not hit him on that occasion. I never saw her in the shop again at any time."

It appeared from evidence adduced upon the hearing that Mr. Schmitz was on very friendly terms with a Mrs. Rose, mother of three children, who was separated from her husband. Mr. Goldstein, called on behalf of defendant, testified that she had known the Schmitzes for about ten years, had visited at their home and had met them at social functions and at summer resorts on several occasions, and that Mrs. Schmitz had always treated her husband with consideration. She said that the last time she saw Mr. Schmitz was in 1938, in South Haven; that he had a woman in his car and when the witness inquired what had become of his family he said he had filed a bill for divorce; that in July, 1939, she saw Mr. Schmitz sitting on a porch on the pier with another woman, "with his hands on his hips."

The older daughter, Esther, likewise appeared in court in response to a subpoena. With reference to the occasion in May, 1937, she testified that her father and mother had had an argument, and

that her mother became hysterical and fell to the floor. Dr. Billow was called and administered sedatives to quiet her. She testified that she had never seen her mother strike Mr. Schultz nor had she seen any bruises on her father at any time. She said that the parties got along fairly well together, except for occasional arguments such as occur in many households. She said that for about a year prior to the separation her father and mother were not on speaking terms, but living in the same house and occupying different rooms. "Father did not make an effort to speak to her, but she on fifteen or more occasions made efforts to speak to him. His response was to leave him alone." She then related her observations with reference to Mr. Schultz's relationship with Mrs. Ross. The witness had first met Mrs. Ross at a card party, and later saw her at South Haven, where she occupied a cottage several miles from that of her mother's. She testified that Mrs. Ross was in South Haven from July, 1937, until September of that year, and produced three letters written by Mrs. Ross to her father, dated respectively July 29, 1938, August 5, 1938, and August 12, 1938. All these letters are of an endearing and intimate character and indicate a close relationship between the parties. In one of them she says that when evening comes she gets "so lonesome that I just don't know what to do with myself. I do hope that maybe you will be able to come here & stay for a few days, that would be wonderful. * * * I will be waiting for your call Sat. so until then I remain your Nettie." In the second letter she says that "I found your letter and believe me I was overjoyed. * * * Do not forget that I shall wait for you Saturday night. Your Nettie." In the third letter she again acknowledges receipt of a letter from Mr. Schultz, and says that she is glad that she 'phoned him yesterday, because she was very restless and felt much better after she had talked to him. "You inquire if I would care to stay here another week. I do not know what to say, because while it is indeed extremely hot, I can not enjoy my stay here because I am very

that her mother became hysterical and fell to the floor. Dr. Billow was called and administered sedatives to quiet her. She testified that she had never seen her mother strike Mr. Schultz nor had she seen any bruises on her father at any time. She said that the parties got along fairly well together, except for occasional arguments such as occur in many households. She said that for about a year prior to the separation her father and mother were not on speaking terms, but living in the same house and occupying different rooms. "Father did not make an effort to speak to her, but she on fifteen or more occasions made efforts to speak to him. His response was to leave him alone." She then related her observations with reference to Mr. Schultz's relationship with Mrs. Rose. The witness had first met Mrs. Rose at a card party, and later saw her at South Haven, where she occupied a cottage several miles from that of her mother's. She testified that Mrs. Rose was in South Haven from July, 1937, until September of that year, and produced three letters written by Mrs. Rose to her father, dated respectively July 29, 1936, August 2, 1936, and August 12, 1936. All these letters are of an endearing and intimate character and indicate a close relationship between the parties. In one of them she says that when evening comes she gets "so lonesome that I just don't know what to do with myself. I do hope that maybe you will be able to come here & stay for a few days, that would be wonderful. * * * I will be waiting for your call Sat. so until then I remain your Nettie." In the second letter she says that "I found your letter and believe me I was overjoyed. * * * Do not forget that I shall wait for you Saturday night. Your Nettie." In the third letter she again acknowledges receipt of a letter from Mr. Schultz, and says that she is glad that she 'phoned him yesterday because she was very restless and felt much better after she had talked to him. "You know if I could stay in stay here another week. I do not know what to say, because while it is indeed extremely hot, I can not enjoy my stay here because I am very

much lonesome for you. However, we will see about that when you come out here whether I am to stay here or go home."

Esther Schultz further testified that she visited the cottage of Mrs. Ross in the summer of 1937, and later had a conversation with her father. She told her father that she had asked Mrs. Ross to leave him alone, to which Mrs. Ross replied, "I am sorry, you better go to your father and talk to him. Don't come and talk to me." She said that in the course of this conversation her father said that Esther "could not dictate his friends to him," and that he was "old enough to choose his friends for himself, and * * * to do whatever he pleases." She further said that she had talked to him at other times about Mrs. Ross, and that he always made the same reply. Esther also testified that during this period she had occasion to hear from Mrs. Ross, who telephoned to the home of Mrs. Schultz on two occasions and asked for Mr. Schultz. Esther's testimony was generally to the effect that she loved both her father and mother and did everything possible to promote harmony between them; that Mr. Schultz was a good husband and father, and that Mrs. Schultz treated him with consideration.

After the separation Mr. Schultz took an apartment in the same building where Mrs. Ross lived and Esther testified that she frequently saw his automobile parked in front of the house.

The younger daughter, Miriam, who was attending high school at the time of the trial, said that she had never seen her mother "raise a hand to strike father," and that although her father swore at her mother, she had never seen him strike her.

Earl Schultz, plaintiff's nephew, testified that he was employed at his uncle's office in the summer of 1937 and until September, 1938; that he knew Nettie Ross, and had seen her in the place of business in his uncle's company. He had also talked to her on the telephone on several occasions and conveyed messages from her to Mr. Schultz, and mailed letters from him addressed to Mrs. Ross.

After a full hearing the chancellor was of the opinion

much longer for you. However, we will see about that when you come out here whether I am to stay here or go home."

Father Schultz further testified that she visited the cottage of Mrs. Ross in the summer of 1937, and later had a conversation with her father. She told her father that she had asked Mrs. Ross to leave him alone, to which Mrs. Ross replied, "I am sorry, you better go to your father and talk to him. Don't come and talk to me." She said that in the course of this conversation her father said that Father "could not discuss his friends to him," and that he was "old enough to choose his friends for himself," and " * * " to do whatever he pleased." She further said that she had talked to him at other times about Mrs. Ross, and that he always made the same reply. Father also testified that during this period she had occasion to hear from Mrs. Ross, who telephoned to the home of Mrs. Schultz on two occasions and asked for Mr. Schultz. Father's testimony was generally to the effect that she loved both her father and mother and did everything possible to promote harmony between them; that Mr. Schultz was a good husband and father, and that Mrs. Schultz loved him with affection.

After the separation Mr. Schultz took an apartment in the same building where Mrs. Ross lived and Father testified that she frequently saw his automobile parked in front of the house. The younger daughter, Miriam, who was attending high school at the time of the trial, said that she had never seen her mother "raise a hand to strike Father," and that although her father swore at her mother, she had never seen him strike her.

Earl Schultz, Plaintiff's nephew, testified that he was employed at his uncle's office in the summer of 1937 and until September, 1938; that he knew Nettie Ross, and had seen her in the place of business in his uncle's company. He had also called to her on the telephone on several occasions and conveyed messages from her to Mr. Schultz, and mailed letters from him addressed to Mrs. Ross.

After a full hearing the chancellor was of the opinion

that the complaint was not sustained by the evidence and said:
"I believe that she has had more trouble with him than he has with her, and when he says he has been a dutiful husband - I am inclined to think that you don't get to be a dutiful husband by carrying on an affair with another married woman with three children, and that seems pretty well established by the evidence. * * * I think he has made out a case of separate maintenance. I believe \$31 a week would be a proper order for support. * * * You may present a decree. * * * For the benefit of the record we are basing the finding on a \$65 a week drawing account. Two Hundred eighty-five dollars attorney's fees and costs of this proceeding. * * *."

As ground for reversal it is urged that the decree for separate maintenance is not supported by the evidence; that separate maintenance, being a statutory remedy, the defendant must prove that she is without fault, and that the court erred in dismissing plaintiff's complaint. While it is fairly clear that the parties were incompatible and had frequent arguments over matters which are not related to the charges of cruelty, it is undisputed that Mr. Schultz left his wife's home without any explanation and after having apparently planned to leave for some time in advance. Nothing occurred April 20, 1938, or immediately prior thereto, to justify his leaving. It is evident that many of the altercations described by the witnesses resulted from his relationship with Mrs. Ross; that Mrs. Schultz knew all about this affair and rightfully resented it. The chancellor who heard the evidence was in a better position to judge of the credibility of the witnesses who testified for the respective parties affecting the charges of cruelty and misconduct, and after a careful examination of the record we are not disposed to disturb his finding.

Plaintiff complains as to the allowance made for alimony and support of the younger child. The chancellor based this on an income of \$65 a week. The allowance of attorneys' fees is not questioned. The record shows that according to plaintiff's own testimony he drew approximately \$60 a week, and sometimes as much as \$100, from the

that the complaint was not sustained by the evidence and said:

"I believe that she has had more trouble with him than he has with her, and when he says he has been a dutiful husband -- I am inclined to think that you don't get to be a dutiful husband by carrying on an affair with another married woman with three children, and that seems pretty well established by the evidence. * * * I think he has made out a case of separate maintenance. I believe

\$21 a week would be a proper order for support. * * * You may present a decree. * * * For the benefit of the record we are basing the finding on a \$25 a week drawing account. Two hundred eighty-five dollars attorney's fees and costs of this proceeding. * * *"

As ground for reversal it is urged that the decree for

separate maintenance is not supported by the evidence; that separate maintenance, being a statutory remedy, the defendant must prove that she is without fault, and that the court erred in dismissing plaintiff's complaint. While it is fairly clear that the parties were

incompatible and had frequent arguments over matters which are not related to the charges of cruelty, it is undisputed that Mr. Schmidt left his wife's home without any explanation and after having apparently planned to leave for some time in advance. Nothing occurred April 30, 1938, or immediately prior thereto, to justify his leaving. It is evident that many of the allegations described by the witnesses

resulted from his relationship with her. The chancellor who heard the evidence was in a better position to judge of the credibility of the witnesses who testified for the respective parties

affecting the charges of cruelty and misconduct, and after a careful examination of the record we are not disposed to disturb his finding. Plaintiff complains as to the allowance made for alimony and support of the younger child. The chancellor based this on an income of \$25 a week. The allowance of attorney's fees is not questioned. The record shows that according to plaintiff's own testimony he drew

approximately \$20 a week, and sometimes as much as \$100, from the

corporation of which he was a half owner. In addition to that he was paid his daily expenses, such as meals and incidental expenses, and was provided with an automobile for his private use. The business operated by plaintiff and his brother deals in waste material in which daily purchases are made of approximately \$200 to \$300. The sales of the company run from \$6,000 to \$10,000 a month, making an annual turnover of about \$100,000. The plant on which the business is operated is owned by the corporation, and consists of two buildings. Defendant, on the other hand, has no income whatsoever and is entirely dependent upon plaintiff for support and maintenance. She has reached an age in life when there is no reasonable expectation that she can go out and earn any money. Her inability to perform any work except household duties left her entirely dependent upon the amount awarded by the court.

Defendant was clearly living separate and apart from her husband at the time of the trial and the chancellor found that it was without fault on her part. He was also of opinion that plaintiff's complaint was not proved. We find no convincing reason for disturbing the findings of the chancellor and the decree should be affirmed. It is so ordered.

DECREE AFFIRMED.

Scanlan and Sullivan, JJ., concur.

corporation of which he was a full owner. In addition to that he was paid his daily expenses, such as meals and incidental expenses, and was provided with an automobile for his private use. The business operated by plaintiff and his brother deals in assets material in which daily purchases are made of approximately \$200 to \$300. The sales of the company run from \$5,000 to \$10,000 a month, making an annual turnover of about \$100,000. The plant on which the business is operated is owned by the corporation, and consists of two buildings. Defendant on the other hand, has no income whatsoever and is entirely dependent upon plaintiff for support and maintenance. The fact remains an eye in life when there is no reasonable expectation that she can go out and earn any money. Her inability to perform any work except household duties left her entirely dependent upon the money coming from the corporation. Defendant was directly living separately and apart from her husband at the time of the trial and the conclusion being that it was without fault on her part. He was also of opinion that plaintiff's complaint was not proved. He found no convincing reason for this during the course of the examination and the return shall be affirmed. It is so ordered.

ORDER AFFIRMED.

WILLIAM H. MILLER, JR., CLERK.

41215

JACK SCHUMAN,
Appellee,

v.

MARY DAUSCH, a widow,
et al.,
Defendants.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

ON APPEAL OF ISADORE WOLF,
Appellant.

307 L.A. 379

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

In 1933 Chicago Title & Trust Company filed a bill to foreclose a first mortgage, naming as defendants the owner of the equity, Isadore Wolf, judgment creditor, and others. While that suit was pending Jack Schuman, plaintiff herein, filed a bill to foreclose a second mortgage on the same property, also naming as defendants the owner of the equity, Isadore Wolf, the judgment creditor and other necessary parties. Wolf thereupon filed a motion to strike the second mortgage foreclosure complaint, upon the theory that it would cast a hardship upon him and other parties to the suit to incur the additional expense of defending two proceedings, that the two proceedings constituted a multiplicity of suits, and that the second complaint was filed for the purpose of harassing him and other defendants. The chancellor denied the motion. Wolf elected to stand by his motion and was defaulted and subsequently a decree of foreclosure was entered against him and others. Wolf appeals from the ruling of the court and contends that under par. 172, sec. 48, p. 2420 of chap. 110 (1939 Ill. Rev. Stats.) the court should have dismissed the bill because of a prior suit pending.

The rule is well settled that in order to sustain the plea of another action pending at law or in equity it is essential that it shall appear not only that there is a prior action pending

307 I.A. 279

COOK COUNTY

JACK SCHUMAKER
Appellant,
vs.
MARY DARRICH, a widow,
et al.,
Defendants.

ON APPEAL FROM ISADORE WOLF,
Appellant.

MR. PRESIDING JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

In 1933 Chicago Title & Trust Company filed a bill to foreclose a first mortgage, naming as defendants the owner of the equity, Isadore Wolf, judgment creditor, and others. While that suit was pending Jack Schumaker, plaintiff herein, filed a bill to foreclose a second mortgage on the same property, also naming as defendants the owner of the equity, Isadore Wolf, the judgment creditor and other necessary parties. Wolf thereupon filed a motion to strike the second mortgage foreclosure complaint, upon the theory that it would cast a hardship upon him and other parties to the suit to incur the additional expense of defending two proceedings, that the two proceedings constituted a multiplicity of suits, and that the second complaint was filed for the purpose of harassing him and other defendants. The chancellor denied the motion. Wolf elected to stand by his motion and was defaulted and subsequently a decree of foreclosure was entered against him and others. Wolf appeals from the ruling of the court and contends that under par. 17S, sec. 48, p. 2420 of chap. 110 (1939 Ill. Rev. Stats.) the court should have dismissed the bill because of a prior suit pending.

The rule is well settled that in order to sustain the plea of another action pending at law or in equity it is essential that it shall appear not only that there is a prior action pending

between substantially the same parties, but also that the cause or causes of action and the issues involved are substantially the same in the two suits. (1 Corpus Juris 61.) The two suits in question were different and separate actions. One sought the foreclosure of the lien of a first mortgage trust deed, whereas the second action was brought to foreclose the lien of an entirely different and separate mortgage under a separate instrument.

Wolf's counsel argues that Schuman, complainant in the second suit, could have filed a cross bill in the first foreclosure proceeding and secured all the relief that he could hope to obtain by a separate suit. While this may be true counsel cites no authorities and we know of none which would require Schuman to proceed in that manner. In Torne v. Letts, 177 Ill. App. 286, the court said (p. 289): "Whatever the nature of said prior suit, we do not understand that Pretzsch could have been required to file a cross bill to foreclose his lien." Citing Jones on Mortgages, vol. 3, sec. 1445 and Mulcahey v. Strauss, 151 Ill. 70. In Mulcahey v. Strauss, 151 Ill. 70, plaintiff filed a bill to foreclose a mortgage to which certain of the defendants filed a plea alleging a prior suit pending which had made the holder of the mortgage^a party defendant. The plea was overruled and upon appeal the court said (p. 83): "We are not prepared to hold, that the appellee was obliged to assert her rights by such a cross bill, rather than by an original bill."

None of the cases cited by defendant holds that the junior mortgagee must file a cross bill when he is made party defendant to a first mortgage foreclosure. The cases relied upon by Wolf involved generally suits where there was a prior suit pending by either the same plaintiff or some other person in a representative capacity acting for plaintiff under the same cause of action.

We are of opinion that the chancellor properly denied the motion to strike. The order of the Superior court is affirmed.

ORDER AFFIRMED.

Scanlan and Sullivan, JJ., concur.

between substantially the same parties, was also that the cause or causes of action and the issues involved are substantially the same in the two suits. (I forget which of.) The two suits in question were different and separate actions. The mortgage foreclosure of the lien of a first mortgage was not, whereas the second action was brought to foreclose the lien of an entirely different and separate mortgage under a separate instrument.

Well's counsel argues that because, contained in the second suit, could have filed a cross bill in the first foreclosure proceeding and secured all the relief that he could hope to obtain by a separate suit. While this may be true counsel cited no authorities and we know of none which would require someone to proceed in that manner. In Forbes v. Miller, 177 Ill. App. 486, the court said (p. 489): "Whatever the nature of said prior suit, we do not understand that Foreman could have been required to file a cross bill to foreclose his lien." Citing Jones on Foreclosures, Vol. 2, sec. 1447 and Wheeler v. Wheeler, 112 Ill.

90. In Wheeler v. Wheeler, 112 Ill. 90, plaintiff filed a bill to foreclose a mortgage to which certain of the defendants filed a plea alleging a prior suit pending which had made the holder of the mortgage party defendant. The plea was overruled and upon appeal the court said (p. 93): "We are not prepared to hold, that the appellee was obliged to assert her rights by such a cross bill, rather than by an original bill."

None of the cases cited by defendant holds that the junior mortgages must file a cross bill when he is made party defendant to a first mortgage foreclosure. The cases relied upon by Well involved generally suits where there was a prior suit pending by either the same plaintiff or some other person in a representative capacity acting for plaintiff under the same cause of action.

We are of opinion that the chancellor properly denied the motion to strike. The order of the Superior Court is affirmed.

ORDER AFFIRMED.

40514

THE NORTHERN TRUST COMPANY,
an Illinois corporation,
as Trustee, et al.,
(Plaintiffs) Appellees,

v.

CONTINENTAL ILLINOIS NATIONAL
BANK AND TRUST COMPANY, etc.,
et al.,
(Defendants) Appellees.

A. F. GARTZ, JR., and HERBERT
P. CRANE,
(Defendants) Appellants.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

307 I.A. 380¹

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

A complaint, and amendment thereto, in equity was brought by The Northern Trust Company, as trustee (Emily H. Junkin, who was Emily Hutchinson Crane, the widow of Richard T. Crane, deceased, was subsequently joined as co-plaintiff), against the executors of the will of Richard T. Crane, Jr., deceased, and the trustees thereunder, and Florence H. Crane, the surviving widow of Richard T. Crane, Jr., as distributees of his estate, and Charles R. Crane, to enforce against them certain obligations assumed by Richard T. Crane, Jr., and Charles R. Crane under a contract with Emily Hutchinson Crane, dated December 2, 1912, to provide her with an annual income of \$100,000 during her lifetime. The complaint as amended sought to enforce against defendants Kate C. Gartz, Mary C. Russell, Frances C. Lillie, Emily C. Chadbourne and Herbert P. Crane, sisters and brother of Richard T. Crane, Jr., and Charles R. Crane, and against A. F. Gartz, Jr., as assignee of Kate C. Gartz, certain obligations which it is alleged the said sisters and brother had assumed toward Emily H. Junkin under the terms of a so-called family settlement agreement dated June 11, 1914, as supplemented by a trust agreement entered into by them with The Northern Trust Company, as trustee, under the same date, which was attached to and made a part of the

THE NORTHERN TRUST COMPANY,
INCORPORATED IN DELAWARE,
as Trustee of the

COOKING, BAKING AND
REFINING COMPANY, INC.,
of Delaware, a corporation

A. T. WATKINS, JR., and
CHARLES R. CRANE,
of Delaware, appellants,

VERSUS
THE NORTHERN TRUST COMPANY,
INCORPORATED IN DELAWARE,

80714.380

MR. JUSTICE SCAMMAN DELIVERED THE OPINION OF THE COURT.

A complaint and amendment thereto, in equity was brought by the Northern Trust Company, as Trustee (Emily M. Watkins, deceased, Emily Hutchinson Crane, the widow of Richard T. Crane, deceased, was subsequently joined as co-plaintiff), against the executor of the will of Richard T. Crane, Jr., deceased, and the respondents, and Florence R. Crane, the surviving widow of Richard T. Crane, Jr., as distributees of his estate, and Charles R. Crane, to enforce against them certain obligations assumed by Richard T. Crane, Jr., and Charles R. Crane under a contract with Emily Hutchinson Crane, dated December 2, 1912, to provide her with an annual income of \$100,000 during her lifetime. The complaint as amended sought to enforce against defendants Kate C. Wark, Emily C. Wark, Thomas C. Wark, Emily C. Wark and Robert T. Crane, heirs and brother of Richard T. Crane, Jr., and Charles R. Crane, and against A. T. Watkins, Jr., as assignee of Kate C. Wark, certain obligations which it is alleged the said sisters and brother had assumed toward Emily M. Watkins under the terms of a so-called family settlement agreement dated June 11, 1912, as supplemented by a trust agreement entered into by them with the Northern Trust Company, as trustee, about the same date, which was alleged to and was a part of the

family settlement agreement as Exhibit E. The complaint as amended also sought personal recovery from the said members of the Crane family of existing deficits between the income actually received by Emily M. Junkin under the various trusts in question, and the amount of her guaranteed income. The complaint as amended also asked that the court retain jurisdiction of all the parties to the action to determine the amount of future deficits and to enforce the collection thereof. Charles R. Crane and the distributees of the estate of Richard T. Crane, Jr., deceased, filed a counterclaim in which they claimed that by virtue of the family settlement agreement and related documents their four sisters and brother Herbert had assumed five-sevenths of the liability to Emily M. Junkin for the deficits, each severally to the extent of one-seventh thereof; that as between the counterclaimants on the one hand, and the four sisters and Herbert on the other hand, the primary liability for five-sevenths of the liability for the deficits rested upon the said four sisters and Herbert (severally to the extent of one-seventh each), and that the counterclaimants had the right to compel the said sisters and Herbert to perform their respective obligations to Emily M. Junkin in exoneration of the liability which Charles R. Crane and Richard T. Crane, Jr., had initially assumed to her. Both plaintiffs and counterclaimants claimed that it was not necessary, in order that the liability of the four sisters and Herbert be enforced, that the deficits be first paid to Mrs. Junkin either by Charles R. Crane or by the distributees of the estate of Richard T. Crane, Jr., deceased; that all of the parties in interest were before the court and the court had full jurisdiction to determine and adjudicate their respective obligations. Both plaintiffs and counterclaimants also claimed that the reduction of the guaranteed income of Mrs. Junkin from \$100,000 to \$85,000 inured solely to the benefit of Charles R. Crane and Richard T. Crane, Jr., and his distributees (to the extent of one-half each)

family settlement agreement as Exhibit N. The complaint as amended also sought personal recovery from the said members of the Grane family of existing deficits between the income actually received by Emily E. Tunkin under the various trusts in question, and the amount of her guaranteed income. The complaint as amended also asked that the court retain jurisdiction of all the parties to the action to determine the amount of future deficits and to enforce the collection thereof. Charles N. Grane and the distributees of the estate of Richard T. Grane, Jr., deceased, filed a counterclaim in which they claimed that by virtue of the family settlement agreement and related documents their four sisters and brother Herbert had assumed five-sevenths of the liability to Emily E. Tunkin for the deficits, each severally to the extent of one-seventh thereof; that as between the counterclaimants on the one hand, and the four sisters and Herbert on the other hand, the primary liability for five-sevenths of the liability for the deficits rested upon the said four sisters and Herbert (severally to the extent of one-seventh each), and that the counterclaimants had the right to compel the said sisters and Herbert to perform their respective obligations to Emily E. Tunkin in exoneration of the liability which Charles N. Grane and Richard T. Grane, Jr., had initially assumed to her. Both plaintiffs and counterclaimants claimed that it was not necessary, in order that the liability of the four sisters and Herbert be enforced, that the deficits be first paid to Mrs. Tunkin either by Charles N. Grane or by the distributees of the estate of Richard T. Grane, Jr., deceased; that all of the parties in interest were before the court and the court had full jurisdiction to determine and adjudicate their respective obligations. Both plaintiffs and counterclaimants also claimed that the income of the guaranteed income of Mrs. Tunkin from \$100,000 to \$25,000 turned solely to the benefit of Charles N. Grane and Richard T. Grane, Jr., and his distributees (to the extent of one-half each)

and that the respective liabilities of the four sisters and Herbert should be enforced upon the basis of \$100,000. Both plaintiffs and cross-complainants also claimed that the jurisdiction of the Probate court of Cook county, in which the administration of the estate of Richard T. Crane, Jr., was pending, was inadequate for the determination and adjustment of the rights and interests of the several parties to the action and that therefore it was necessary to invoke the jurisdiction of a court of equity for that purpose.

The decree finds that each of the defendant members of the Crane family, save Kate C. Gartz and Herbert P. Crane, has fully discharged his or her obligation under the so-called family settlement agreement and the record shows they have abided by the decree entered in this cause. A. F. Gartz, Jr., and Herbert P. Crane have filed a joint appeal.

The essential facts in the case are not controverted and they are stated clearly ⁱⁿ and ~~in~~ sequential order in the findings of the court. To understand the contentions raised by appellants it is necessary to state the trial court's findings of fact and the decretal part of the decree. They are as follows:

"1. That on October 13, 1903, Richard T. Crane, * * * as party of the first part, and Emily Hutchinson (now Emily H. Junkin, one of the plaintiffs herein), party of the second part, made * * * a certain Marriage Settlement Agreement, in pursuance of which said * * * [Crane] gave * * * and conveyed to said * * * [Hutchinson] certain bonds of the Atchison, Topeka & Santa Fe Railroad Company, of the par value of \$115,000, bearing interest * * *, as and for her absolute estate and property, and in addition thereto assigned, transferred and conveyed to The Northern Trust Company, as Trustee, certain other securities therein described, to have, hold, manage, control and care for and collect the income therefrom, and to pay the net income therefrom as received to said

and that the respective liabilities of the four estates and Herbert should be enforced upon the basis of \$100,000. Both plaintiffs and cross-complainants also claimed that the jurisdiction of the Probate court of Cook county, in which the administration of the estate of Richard T. Crane, Jr., was pending, was inadequate for the determination and adjustment of the rights and interests of the several parties to the action and that therefore it was necessary to invoke the jurisdiction of a court of equity for that purpose.

The decree finds that each of the defendant members of the Crane family, save Kate C. Garte and Herbert T. Crane, had fully discharged his or her obligation under the so-called family settlement agreement and the record shows they have acted by the decree entered in this cause. A. J. Garte, Jr., and Herbert T. Crane have filed a joint appeal.

The essential facts in the case are not controverted and they are stated clearly and ⁱⁿ sequential order in the findings of the court. To understand the contentions raised by appellants it is necessary to state the trial court's findings of fact and the decretal part of the decree. They are as follows:

"1. That on October 13, 1903, Richard T. Crane, * * * as party of the first part, and Emily Hutchinson (now Emily M. Junkin, one of the plaintiff's herein), party of the second part, made * * * a certain Marriage Settlement Agreement, in pursuance of which said * * * (Crane) gave * * * and conveyed to said [Hutchinson] certain bonds of the Atchafalaya, Topeka & Santa Fe Railroad Company, of the par value of \$11,000, bearing interest * * *, as and for her absolute estate and property, and in addition thereto assigned, transferred and conveyed to the Northern Trust Company, as trustee, certain other securities therein described, to have, hold, manage, control and care for and collect the income therefrom, and to pay the net income therefrom as received to said

* * * [Crane] during his life, and after his death to pay the same to said * * * [Hutchinson] quarterly, during her life, provided she should survive said * * * [Crane]. That * * * pursuant to the intention of said parties, as in said agreement expressed, said marriage was consummated and The Northern Trust Company, as such Trustee, assumed and took control and management of said securities so transferred to it, as aforesaid, and paid the net income therefrom to * * * [Crane] during his lifetime, and since his death has paid the same to * * * Emily H. Junkin * * *.

"2. That on January 8, 1912, the said Richard T. Crane * * * died, leaving * * * his widow, him surviving, and on December 2, 1912, the defendants Charles R. Crane and Richard T. Crane, Jr., sons of said party of the first part, for good and valuable considerations therein * * * set forth, entered into an agreement with said Emily Hutchinson Crane * * * in and by which they severally agreed with * * * [her] that from the net income derived from said securities so given and transferred to her by * * * Crane, Sr., as aforesaid, and from said securities so transferred and delivered to the Northern Trust Company, as Trustee, as aforesaid, together with the income from 5,000 shares of the capital stock of Crane Company, to be by them severally (each 2500 shares thereof) transferred to and deposited with The Northern Trust Company as such Trustee (and which were thereupon issued and transferred to The Northern Trust Company as such Trustee), she * * * should receive an annual net income, without any deduction whatsoever, of the aggregate sum of \$100,000 during her lifetime. In and by said Agreement * * * Charles R. Crane and Richard T. Crane, Jr., further expressly agreed with Emily H. Crane (* * * now Emily H. Junkin) that in case the net income received by The Northern Trust Company, as such Trustee, and paid to her under said Marriage Settlement Agreement ^{and under said Agreement} of December 2, 1912, including the net income derived from said securities so given to her by * * * Crane, Sr., as aforesaid, should in any year during her life fall short of said aggregate sum of \$100,000, then * * *

*** [Crane] during his life, and after his death to pay the same to said *** [Hutchinson] quarterly, during her life, provided she should survive said *** [Crane]. That *** pursuant to the intention of said parties, as in said agreement expressed, said marriage was consummated and The Northern Trust Company, as such Trustee, assumed and took control and management of said securities so transferred to it, as aforesaid, and paid the net income therefrom to *** [Crane] during his lifetime, and since his death has paid the same to *** Emily M. Tamm ***.

"2. That on January 8, 1912, the said Richard T. Crane *** died, leaving *** his widow, who survives, and on December 2, 1912, the defendants Charles H. Crane and Richard T. Crane, Jr., some of said party of the first part, for good and valuable considerations therein *** set forth, entered into an agreement with said Emily Hutchinson Crane *** in and by which they severally agreed with *** [her] that from the net income derived from said securities so given and transferred to her by *** Crane, Jr., as aforesaid, and from said securities so transferred and delivered to the Northern Trust Company, as Trustee, as aforesaid, together with the income from 5,000 shares of the capital stock of Crane Company, to be by them severally (each 2500 shares thereof) transferred to and deposited with The Northern Trust Company as such Trustee (and which were thereupon issued and transferred to The Northern Trust Company as such Trustee), she *** should receive an annual net income, without any deduction whatsoever, of the aggregate sum of \$100,000 during her lifetime. In and by said agreement *** Charles H. Crane and Richard T. Crane, Jr., further expressly agreed with Emily M. Crane (*** now Emily M. Tamm) that in case the net income received by The Northern Trust Company, as such Trustee, and under said agreement paid to her under said Marriage Settlement Agreement of December 2, 1912, including the net income derived from said securities so given to her by *** Crane, Jr., as aforesaid, should in any year during her life fall short of said aggregate sum of \$100,000, then ***

Charles R. Crane and Richard T. Crane, Jr., would, on demand, pay to Emily M. Crane, or to her order, one-half of such deficiency,

"That The Northern Trust Company thereupon accepted said 5,000 shares of capital stock of Crane Company, as such Trustee, and agreed to hold the same, together with the securities so held by it under said Marriage Settlement Agreement * * *, and thereupon one of the originals of said Agreement last mentioned was at the same time deposited with The Northern Trust Company, as such Trustee, for the purpose of enabling it to comply with the terms thereof.

"Said Agreement of December 2, 1912, expressly provided that the dividends and income derived from said 5,000 shares of stock The Northern Trust Company, as Trustee, should first pay its reasonable charges for its services in acting as Trustee under said Agreement and in collecting and paying over the income from said shares, and also its reasonable charges for acting as Trustee under said Marriage Settlement Agreement from the date of said Agreement of December 2, 1912, and for collecting and paying over the income to said second party pursuant to said Marriage Settlement Agreement, and also all taxes, assessments and governmental charges of every kind which might be levied, assessed or imposed at any time thereafter, during the life of said second party, upon the trust property held by said Trustee under said Agreement, and upon the trust property held under said Marriage Settlement Agreement, and upon said bonds of the Atchison, Topeka and Santa Fe Railroad Company; and should pay to said second party quarter-yearly so long as she should live so much of said dividends and income as should be required to make her net annual income, including the net amount of income she should receive under said Marriage Settlement Agreement and from said Atchison * * * Bonds the sum of \$100,000 per year.

"That on June 11, 1914, Charles R. Crane and Richard T. Crane, Jr., together with defendants, Kate C. Gartz, Mary C. Russell, Frances C. Lillie and Emily C. Chadbourne, their sisters, and Herbert P. Crane, their brother, for good considerations therein named, entered into an agreement commonly known and referred to by them

Charles R. Crane and Richard T. Crane, Jr., would, on demand, pay to Emily H. Crane, or to her order, one-half of such deficiency, "That the Northern Trust Company thereupon accepted said 5,000 shares of capital stock of Crane Company, as such Trustee, and agreed to hold the same, together with the accretions so held by it under said Marriage Settlement Agreement * * *, and thereupon one of the originals of said Agreement last mentioned was at the same time deposited with The Northern Trust Company, as such Trustee, for the purpose of enabling it to comply with the terms thereof. "Said Agreement of December 2, 1912, expressly provided that the dividends and income derived from said 5,000 shares of stock The Northern Trust Company, as Trustee, should first pay its reasonable charges for its services in acting as Trustee under said Agreement and in collecting and paying over the income from said shares, and also its reasonable charges for acting as Trustee under said Marriage Settlement Agreement from the date of said Agreement of December 2, 1912, and for collecting and paying over the income to said second party pursuant to said Marriage Settlement Agreement, and also all taxes, assessments and governmental charges of every kind which might be levied, assessed or imposed at any time thereafter, during the life of said second party, upon the trust property held by said Trustee under said Agreement, and upon the trust property held under said Marriage Settlement Agreement, and upon said bonds of the Atchafalaya, Topeka and Santa Fe Railroad Company, and should pay to said second party quarterly so long as she should live so much of said dividends and income as should be required to make her net annual income, including the net amount of income she should receive under said Marriage Settlement Agreement and from said Atchafalaya * * *. "That on June 11, 1914, Charles R. Crane and Richard T. Crane, Jr., together with defendants, Mrs. J. D. Davis, Mary C. Russell, Frances C. Miller and Emily D. Chubbuck, their heirs, and Herbert P. Crane, their executors, for good consideration therein named entered into an agreement commonly known and referred to by them

as the 'Family Settlement Agreement,' by the terms of which Charles R. Crane and Richard T. Crane, Jr., agreed each with the other, to buy or sell from or to such other, or to cause or permit the said Crane Company to buy, each his interest in said Crane Company, and each of the said sisters and Herbert F. Crane, brother of Charles R. Crane and Richard T. Crane, Jr., therein and thereby, severally and not jointly, expressly agreed to pay, on demand, one-seventh of all money which might become due and payable under the Agreement of December 2, 1912.

"In and by said Family Settlement Agreement it was further expressly agreed by and between the parties thereto, including Kate C. Gartz, Frances C. Lillie, Mary C. Russell, Emily C. Chadbourne, and Herbert F. Crane, that for the purpose of facilitating the collection of the aforesaid payments so agreed to be made by the parties to said Agreement, other than Charles R. Crane and Richard T. Crane, Jr., * * * Kate C. Gartz, Frances C. Lillie, Mary C. Russell, Herbert F. Crane, Charles R. Crane and Richard T. Crane, Jr., individually, and Charles R. Crane and Richard T. Crane, Jr., as Trustees under a Trust Agreement to be executed by them and Emily C. Chadbourne, together with said Emily C. Chadbourne, should execute an agreement with The Northern Trust Company as Trustee, which Agreement should be in the form as set out in Exhibit E attached thereto and thereby made a part of said Family Settlement Agreement. Said Agreement, so referred to as Exhibit E, as aforesaid, was thereupon duly executed by all of the parties to the Family Settlement Agreement and by Charles R. Crane and Richard T. Crane, Jr., as Trustees under said Trust Agreement with Emily C. Chadbourne, and by The Northern Trust Company as Trustee thereunder. Said last mentioned agreement provided for the re-transfer of the said 5,000 shares of stock of Crane Company so theretofore deposited by them with The Northern Trust Company as Trustee, as provided by said Agreement of December 2, 1912, to Charles R. Crane and Richard T. Crane, Jr.,

as the 'Family Settlement Agreement,' by the terms of which Charles R. Crane and Richard T. Crane, Jr., agreed each with the other, to buy or sell from or to each other, or to cause or permit the said Crane Company to buy, each his interest in said Crane Company, and each of the said sisters and Herbert F. Crane, brother of Charles R. Crane and Richard T. Crane, Jr., therein and thereto, severally and not jointly, expressly agreed to pay, on demand, one-seventh of all money which might become due and payable under the agreement of December 2, 1912.

"In and by said Family Settlement Agreement it was further expressly agreed by and between the parties thereto, including Kate C. Gutz, Frances C. Millie, Mary C. Russell, Emily C. Chadbourne, and Herbert F. Crane, that for the purpose of facilitating the collection of the aforesaid payments so agreed to be made by the parties to said agreement, other than Charles R. Crane and Richard T. Crane, Jr., * * * Kate C. Gutz, Frances C. Millie, Mary C. Russell, Herbert F. Crane, Charles R. Crane and Charles T. Crane, Jr., individually, and Charles R. Crane and Charles T. Crane, Jr., as Trustees under a Trust Agreement to be executed by them and Emily C. Chadbourne, together with said Emily C. Chadbourne, should execute an agreement with The Northern Trust Company as Trustee, which agreement should be in the form as set out in Exhibit B attached thereto and thereby made a part of said Family Settlement Agreement. Said Agreement, so referred to as Exhibit B, as aforesaid, was thereupon duly executed by all of the parties to the Family Settlement Agreement and by Charles R. Crane and Richard T. Crane, Jr., as Trustees under said Trust Agreement with Emily C. Chadbourne, and by The Northern Trust Company as Trustee thereunder. (This last mentioned agreement provided for the re-transfer of the said 7,000 shares of stock of Crane Company so theretofore deposited by them with The Northern Trust Company as Trustee, as provided by said Agreement of December 2, 1912, to Charles R. Crane and Richard T. Crane, Jr.,

respectively, 2,500 shares to each, and that in lieu thereof each of the said parties to said Family Settlement Agreement, except the Seller thereunder, should deposit with The Northern Trust Company as such Trustee, 1,000 shares of the Crane Company stock, and that said Seller should deposit certain other securities therein described.

"Charles R. Crane became the Seller and Richard T. Crane, Jr., became the Buyer under the so-called Family Settlement Agreement, and thereupon the said 5,000 shares of Crane Company stock were so re-transferred to Charles R. Crane and Richard T. Crane, respectively, 2,500 shares to each, and each of said parties to said agreement, except Charles R. Crane, deposited with The Northern Trust Company, as such Trustee, in accordance with the provisions of said Agreement hereinabove referred to as Exhibit E in said Family Settlement Agreement mentioned, the securities so agreed to be by them respectively deposited, 1,000 shares of Crane Company stock, and Charles R. Crane * * * thereupon deposited with The Northern Trust Company, as such Trustee, certain other securities as therein provided.

"Said Trust Agreement herein and in said Family Settlement Agreement referred to as Exhibit E, as aforesaid, expressly provided that The Northern Trust Company, as Trustee, should keep separate accounts with each of the parties thereto, collect the dividends from each 1,000 shares of stock transferred by the several parties who should have transferred stock to The Northern Trust Company under said agreement, and pay from the dividends received from each 1,000 shares one-seventh of all payments which should be made in accordance with the provisions of said Agreement of December 2, 1912, * * * and one-seventh of all moneys which Charles R. Crane and Richard T. Crane, Jr., covenanted by said Agreement of December 2, 1912 to pay, * * * the remainder, if any, of such dividends to be paid to the respective parties making such deposits. That in addition thereto The Northern Trust Company should collect all interest which should be paid on the securities so deposited by Charles R. Crane, and pay therefrom one-seventh of all payments which should be made in accordance with

respectively, 2,500 shares to each, and that in lieu thereof each of the said parties to said Family Settlement Agreement, except the Seller thereunder, should deposit with The Northern Trust Company as such Trustee, 1,000 shares of the Crane Company stock, and that said Seller should deposit certain other securities therein described.

"Charles R. Crane became the Seller and Richard T. Crane, Jr., became the Buyer under the so-called Family Settlement Agreement, and thereupon the said 2,500 shares of Crane Company stock were so re-transferred to Charles R. Crane and Richard T. Crane, respectively, 2,500 shares to each, and each of said parties to said agreement, except Charles R. Crane, deposited with The Northern Trust Company, as such Trustee, in accordance with the provision of said Agreement heretofore referred to as Exhibit E in said Family Settlement Agreement and mentioned, the securities as set forth therein respectively deposited, 1,000 shares of Crane Company stock, and Charles R. Crane * * * thereupon deposited with The Northern Trust Company, as such Trustee, certain other securities as therein provided.

"Said Trust Agreement herein and in said Family Settlement Agreement referred to as Exhibit E, as aforesaid, expressly provided that The Northern Trust Company, as Trustee, should keep separate accounts with each of the parties thereto, collect the dividends from each 1,000 shares of stock transferred by the several parties who should have transferred stock to The Northern Trust Company under said agreement, and pay from the dividends received from each 1,000 shares one-seventh of all payments which should be made in accordance with the provisions of said Agreement of December 2, 1912, * * * and one-seventh of all moneys which Charles R. Crane and Richard T. Crane, Jr., covenanted by said Agreement of December 2, 1912 to pay, * * *

the remainder, if any, of such dividends to be paid to the respective parties making such deposits. That in addition thereto The Northern Trust Company should collect all interest which should be paid on the securities so deposited by Charles R. Crane, and pay therefrom one-seventh of all payments which should be made in accordance with

said Agreement of December 2, 1912, as hereinbefore stated, and one-seventh of all moneys which Charles R. Crane and Richard T. Crane, Jr., covenanted in said Agreement of December 2, 1912 to pay, the remainder of such interest, if any, to be paid to Charles R. Crane. Said Trust Agreement also expressly provided that nothing therein contained should be construed to release Charles R. Crane and Richard T. Crane, Jr., in any way from any obligations which they have or have had under said Agreement of December 2, 1912, and that nothing therein contained shall be construed to change in any way any of the rights, obligations or duties of the parties to said Agreement of December 2, 1912, to each other. That by reason thereof Charles R. Crane and Richard T. Crane, Jr., and their respective heirs, executors, administrators, representatives and assigns remained primarily liable, as between themselves and Emily H. Junkin for any deficit which might thereafter arise between the income derived from said securities and said guaranteed annuity of \$100,000, each to the extent of one-half thereof.

"And the Court further finds that the Trust Agreement dated June 11, 1914, above and in said Family Settlement Agreement referred to, and the securities therein mentioned and thereafter so deposited with The Northern Trust Company, as Trustee, as aforesaid, were intended as and in fact constituted collateral security for the several undertakings and agreements of the respective members of said family, hereinabove mentioned, by the terms of which each of the said members of said family agreed to pay, on demand, one-seventh of all money which might become due and payable under said Agreement of December 2, 1912.

"In and by said Family Settlement Agreement it was further expressly covenanted and agreed by Kate C. Gartz, Frances C. Lillie, Mary C. Russell, Emily C. Chadbourne and Herbert P. Crane that in case the dividends and income received by The Northern Trust Company, as Trustee, from the shares of stock and the securities so agreed to be and which were deposited with The Northern Trust Company, as Trustee, as aforesaid, should be insufficient to pay all moneys due

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and said Agreement of December 2, 1912, as heretofore stated, and one-seventh of all moneys which Charles H. Crane and Richard T. Crane, Jr., covenanted in said Agreement of December 2, 1912 to pay, the remainder of said income, if any, to be paid to said Trust. Said Trust Agreement also expressly provided that nothing therein contained should be construed to release Charles H. Crane and Richard T. Crane, Jr., in any way from any obligations which they have or have had under said Agreement of December 2, 1912, and that nothing therein contained shall be construed to change in any way any of the rights, obligations or duties of the parties to said Agreement of December 2, 1912, to each other. That by reason thereof Charles H. Crane and Richard T. Crane, Jr., and their respective heirs, administrators, representatives and assigns remained primarily liable as between themselves and said Trust for the said debt with respect thereto after said income derived from said securities and said guaranteed annuity of \$100,000, each to the extent of one-half interest.

"And the court further finds that the Trust Agreement dated June 11, 1914, above and in said Family Settlement Agreement referred to, and the securities therein mentioned and thereafter so deposited with The Northern Trust Company, as Trustee, as aforesaid, were intended as and in fact constituted collateral security for the several undertakings and agreements of the respective members of said family heretofore mentioned, by the terms of which each of the said members of said family agreed to pay, on demand, one-seventh of all moneys which might become due and payable under said Agreement of December 2, 1912, in and by said Family Settlement Agreement it was further expressly covenanted and agreed by Kate C. Garza, Frances C. Millie, Mary C. Millie, with C. Garza and Richard T. Crane, Jr., in case the dividends and income received by The Northern Trust Company, as Trustee, from the shares of stock and the securities so agreed to be and which were deposited with The Northern Trust Company, as Trustee, as aforesaid, should be insufficient to pay all moneys due

and payable under the Agreement of December 2, 1912, then and in such case that they, said sisters and brother of Charles R. and Richard T. Crane, Jr., would each pay to the 'high bidder,' on demand, one-seventh of any sum which such 'high bidder' might be compelled to pay to The Northern Trust Company, as Trustee, in order that he might fully perform the terms of said Agreement of December 2, 1912, on his part to be performed.

"Said Family Settlement Agreement further provided that thereupon such 'higher bidder' agreed to indemnify and hold the 'Seller' harmless from any liability under said Agreement of December 2, 1912, beyond the liability which the 'Seller' had under said Family Settlement Agreement of depositing the securities therein provided for and of paying the difference between the income received therefrom and one-seventh of all sums which might be due and payable under said Agreement of December 2, 1912.

"By reason of the provision in said Family Settlement Agreement * * * Richard T. Crane, Jr., who become the buyer thereunder, became primarily liable as between himself and Charles R. Crane for six-sevenths of any deficit that might arise thereafter under the said Agreement of December 2, 1912, and by reason of the other provisions in said Family Settlement Agreement * * * each of the other parties to said Agreement, viz., Kate C. Gartz, Frances C. Lillie, Emily C. Chadbourne, Mary C. Russell and Herbert P. Crane became primarily liable as between themselves and Charles R. Crane and Richard T. Crane, Jr. for five-sevenths of any deficit that might arise thereafter under said Agreement of December 2, 1912, each to the extent of one-seventh of any such deficit, and Kate C. Gartz, Frances C. Lillie, Emily C. Chadbourne, Mary C. Russell, and Herbert P. Crane further became liable to Emily H. Junkin and to The Northern Trust Company as Trustee, each for one-seventh of such deficit, and also to Richard T. Crane, Jr., each to the extent of one-seventh of such deficit, and Charles R. Crane remained liable as between himself and his said sisters and his brother, Herbert P. Crane, for a like

and payable under the Agreement of December 2, 1912, then and in such case that they, said sisters and brother of Charles A. and Richard T. Crane, Jr., would each pay to the 'high bidder' on demand, one-seventh of any sum which such 'high bidder' might be compelled to pay to The Northern Trust Company, as trustee, in order that he might fully perform the terms of said Agreement of December 2, 1912, on his part to be performed.

"Said family settlement Agreement further provided that thereupon such 'high bidder' agreed to indemnify and hold the 'Seller' harmless from any liability under said Agreement of December 2, 1912, beyond the liability which the 'Seller' had under said family settlement Agreement of depositing the money therefor and of paying the difference between the income received therefrom and one-seventh of all sums which might be due and payable under said Agreement of December 2, 1912.

"By reason of the provision in said family settlement Agreement * * * Richard T. Crane, Jr., who became the buyer thereunder, became primarily liable as between himself and Charles A. Crane for six-sevenths of any deficit that might arise thereafter under the said Agreement of December 2, 1912, and by reason of the other provisions in said family settlement Agreement * * * each of the other parties to said Agreement, viz., Kate C. Crane, Frances C. Willis, Emily C. Goodnow, Mary D. Russell and Herbert P. Crane became primarily liable as between themselves and Charles A. Crane and Richard T. Crane, Jr. for five-sevenths of any deficit that might arise thereafter under said Agreement of December 2, 1912, each to the extent of one-seventh of any such deficit, and Kate C. Crane, Frances C. Willis, Emily C. Goodnow, Mary D. Russell, and Herbert P. Crane further became liable to William D. Barrin and to The Northern Trust Company as trustee, each for one-seventh of such deficit, and also to Richard T. Crane, Jr., each to the extent of one-seventh of such deficit, and Charles A. Crane remained liable as between himself and his said sisters and his brother, Herbert P. Crane, for a like

one-seventh of such deficit; provided, that upon payment by Kate C. Gartz, Frances C. Lillie, Emily C. Chadbourne, Mary C. Russell, and Herbert P. Crane, or any of them, of their respective one-seventh portions of any such deficit to Emily H. Junkin, or to The Northern Trust Company as Trustee, all liability to Charles R. Crane or to Richard T. Crane, Jr. on account of the one-seventh portion or portions of such deficit so paid, and all liability of Charles R. Crane and Richard T. Crane, Jr. to Emily H. Junkin or The Northern Trust Company, as Trustee, on account of the one-seventh portion or portions of such deficit so paid, should be deemed to have been satisfied and discharged.

"4. The Court further finds that on June 2, 1922, for good considerations by Emily H. Junkin received from Charles R. Crane and Richard T. Crane, Jr., their obligation under the Agreement of December 2, 1912, to pay to Emily H. Junkin during her lifetime the sum therein mentioned, was reduced from the sum of \$100,000, as therein provided, to the sum of \$85,000 per annum, and in accordance therewith Emily H. Junkin thereupon, on said June 2, 1922, duly notified The Northern Trust Company as Trustee that the said amount of \$100,000, payable to her annually under said Agreement dated December 2, 1912, had been reduced by the amount of \$15,000 in each year, one-half of which reduction, viz., \$7,500, was to be deducted in each year from the amount payable to her, Emily H. Junkin, from the income from securities deposited with said Trustee by Charles R. Crane and Richard T. Crane, Jr., respectively; and therein and thereby expressly authorized The Northern Trust Company, as such Trustee, to make said deduction from the date of said agreement last mentioned, from the amount which otherwise would be payable to her, Emily H. Junkin, in each year, from the income from the securities deposited with said Trustee by Charles R. Crane and Richard T. Crane, Jr., respectively.

"And the Court finds that in accordance with said Agreement of June 2, 1922, the obligation of Charles R. Crane and Richard T.

one-seventh of such deficit provided, that upon payment by said
C. Crane, Thomas R. Crane, Emily M. Tamm, or any of them, of their respective one-
seventh portions of any such deficit to Emily M. Tamm, or to
The Northern Trust Company as Trustee, all liability to Charles
R. Crane or to Richard T. Crane, Jr., on account of the one-seventh
portion or portions of such deficit as paid, and all liability of
Charles R. Crane and Richard T. Crane, Jr., to Emily M. Tamm or
The Northern Trust Company, as Trustee, on account of the one-seventh
portion or portions of such deficit as paid, should be deemed to
have been satisfied and discharged.

"4. The Court further finds that on June 2, 1922, for
good considerations by Emily M. Tamm received from Charles R.
Crane and Richard T. Crane, Jr., Emily M. Tamm executed an agreement
of December 2, 1912, to pay to Emily M. Tamm during her lifetime
the sum therein mentioned, was reduced from the sum of \$100,000, as
therein provided, to the sum of \$8,000 per annum, and in accordance
therewith Emily M. Tamm thereupon, on said June 2, 1922, duly
notified The Northern Trust Company as Trustee that the said amount
of \$100,000, payable to her annually under said agreement dated
December 2, 1912, had been reduced by the amount of \$19,000 in each
year, one-half of which reduction, viz., \$9,500, was to be deducted
in each year from the amount payable to her, Emily M. Tamm, from
the income from securities deposited with said Trustee by Charles
R. Crane and Richard T. Crane, Jr., respectively; and therein and
thereby expressly affirmed the purpose of said agreement, to wit:
Trustee, to make said deduction from the date of said agreement
last mentioned, from the amount, which otherwise would be payable to
her, Emily M. Tamm, in each year, from the income from the
securities deposited with said Trustee by Charles R. Crane and
Richard T. Crane, Jr., respectively.

"And the Court finds that in accordance with said agreement
of June 2, 1922, the obligation of Charles R. Crane and Richard T.

Crane, Jr. to Emily H. Junkin under said Agreement of December 2, 1912, * * * was reduced to a guaranteed annuity of \$85,000 per annum, for one-half of which guaranteed annuity each of them remained severally liable, but that said Agreement of June 2, 1922, did not affect the liability of each of the sisters and Herbert P. Crane * * * under said Family Settlement Agreement, and they, said sisters and brother, remained liable and are still severally liable each for one-seventh of any deficit in the net income from said securities under said sum of \$100,000 per annum.

"5. The Court further finds that since June 11, 1914, pursuant to the provisions of said Trust Agreement so made and entered into with it, and hereinafter referred to as Exhibit E, The Northern Trust Company, as Trustee as aforesaid, has kept separate accounts with each of the parties to said Family Settlement Agreement, and that until the execution of said Agreement of June 2, 1922, hereinbefore mentioned, said accounts were kept by said Trustee on the basis of the several liability of each of the parties to said Family Settlement Agreement for one-seventh of any deficit which might arise under said Agreement of December 2, 1912. That subsequent to the execution of said contract of June 2, 1922, by and between Charles R. Crane and Richard T. Crane, Jr., of the one part, and Emily H. Junkin, of the other part, said Trustee has properly kept said accounts upon the basis of the obligation of Charles R. Crane and Richard T. Crane, Jr. to pay or cause to be paid to Emily H. Junkin the sum of \$85,000 per annum, instead of \$100,000 per annum, and that in accordance with the direction of Emily H. Junkin to said Trustee, each of said parties to said Agreement of June 2, 1922, to wit, Charles R. Crane and Richard T. Crane, Jr., have been credited in said accounts, out of the income from the securities so theretofore deposited with it, as aforesaid, each with the sum of \$7,500 in each year from the amount payable to said Emily H. Junkin from the income from the securities deposited with said Trustee by

Crane, Jr. so Emily N. Tunkin under said agreement of December 2, 1912, * * * was reduced to a guaranteed annuity of \$87,000 per annum, for one-half of which guaranteed annuity each of them remained severally liable, but that said agreement of June 2, 1922, did not affect the liability of each of the sisters and Herbert P. Crane * * * under said Family Settlement Agreement, and they, said sisters and brother, remained liable and are still severally liable each for one-seventh of any deficit in the net income from said securities under said sum of \$100,000 per annum.

"9. The Court further finds that since June 11, 1914, pursuant to the provisions of said Trust Agreement so made and entered into with it, and hereinafter referred to as Exhibit A, The Northern Trust Company, as Trustee as aforesaid, has kept separate accounts with each of the parties to said Family Settlement Agreement, and that until the execution of said agreement of June 2, 1922, said accounts were maintained, said accounts were kept by said Trustee on the basis of the several liability of each of the parties to said Family Settlement Agreement for one-seventh of any deficit which might arise under said agreement of December 2, 1912. That subsequent to the execution of said contract of June 2, 1922, by and between Charles R. Crane and Richard T. Crane, Jr. of the one part, and Emily N. Tunkin, of the other part, said Trustee has properly kept said accounts upon the basis of the obligation of Charles R. Crane and Richard T. Crane, Jr. to pay or cause to be paid to Emily N. Tunkin the sum of \$87,000 per annum, instead of \$100,000 per annum, and that in accordance with the direction of Emily N. Tunkin to said Trustee, each of said parties to said agreement of June 2, 1922, to wit, Charles R. Crane and Richard T. Crane, Jr., have been credited in said accounts, out of the income from the securities so theretofore deposited with it, as aforesaid, each with the sum of \$7,500 in each year from the amount payable to said Emily N. Tunkin from the income from the securities deposited with said Trustee by

Charles R. Crane and Richard T. Crane, Jr., respectively, on account of their several obligations as aforesaid.

"That said Trustee, since the execution of the said Family Settlement Agreement of June 11, 1914, and the said Trust Agreement made in pursuance of, has rendered quarterly statements of account to each of the parties to said Agreements as therein provided, and upon the basis aforesaid, respectively, and that prior to the filing of the complaint in this cause and to the filing of the answers herein of the defendants, A. P. Gartz, Jr. and Herbert P. Crane, no objection to the basis of the liability of the several parties to said Agreements, as shown by said accounts so rendered by said Trustee has ever been made by defendants, Kate C. Gartz, Frances C. Lillie, Mary C. Russell, Emily C. Chadbourne and Herbert P. Crane, or any of them. That all of said defendants last named are of lawful age and fully competent; that by the accounts so rendered to them by said Trustee they were fully advised of the form, method and basis of stating said accounts, and that by their acts and conduct said defendants last above named are estopped to claim the benefit of any reduction in the amount for which they are severally liable because and by reason of the said contract of June 2, 1922.

"The Court finds that the reasonable charges of The Northern Trust Company for acting as such Trustee, as contemplated in and by said Agreements of October 13, 1903, December 2, 1912, and June 11, 1914, and the Trust Agreements pursuant thereto, were the sums shown by said quarterly statements of account and by the account of said Trustee heretofore filed herein, to wit: Two and one-half per cent. per annum upon the income from the securities deposited under and pursuant to said Marriage Settlement Agreement of October 13, 1903; one per cent. per annum upon the income from the securities deposited under and pursuant to said Agreements of December 2, 1912, and June 11, 1914, by Kate C. Gartz, Frances C. Lillie, Mary C. Russell, Emily C. Chadbourne, Herbert P. Crane and

Charles H. Crane and Richard V. Crane, Jr., respectively, on

account of their several collections as trustees.

"That said Trustee, since the execution of the said Family Settlement Agreement of June 11, 1914, and the said Trust Agreement made in pursuance of, has rendered quarterly statements of account to each of the parties to said Agreements as therein provided, and upon the basis aforesaid, respectively, and that prior to the filing of the complaint in this cause and to the filing of the answer herein of the defendants, J. V. Carter, et al., and Robert C. Crane, no objection to the basis of the liability of the several parties to said Agreements, as shown by said accounts as rendered by said Trustee has ever been made by defendants, Kate C. Carter, Frances C. Miller, Mary C. Russell, Emily C. Chadbourne and Herbert P. Crane, or any of them. That all of said defendants last named are of lawful age and fully competent; that by the accounts so rendered to them by said Trustee they were fully advised of the form, method and basis of stating said accounts, and that by their acts and conduct said defendants last above named are estopped to claim the benefit of any reduction in the amount for which they are severally liable because and by reason of the said contract of June 2, 1912.

"The Court finds that the reasonable charges of the Northern Trust Company for acting as such Trustee, as contemplated in and by said Agreements of October 13, 1903, December 2, 1912, and June 11, 1914, and the Trust Agreements pursuant thereto, were the sums shown by said quarterly statements of account and by the records of said Trustee heretofore filed herein, to wit two and one-half per cent. per annum upon the income from the securities deposited under and pursuant to said Family Settlement Agreement of October 13, 1903; one per cent. per annum upon the income from the securities deposited under and pursuant to said Agreements of December 2, 1912, and June 11, 1914, by Kate C. Carter, Frances C. Miller, Mary C. Russell, Emily C. Chadbourne, Herbert P. Crane and

Richard T. Crane, Jr.; one per cent. per annum upon the income from the securities deposited under said Agreements by Charles A. Crane up to March 18, 1924, and thereafter two and one-half per cent. per annum upon the income from said securities so deposited by Charles R. Crane.

"6. The Court further finds that by the terms and by reason of the said Agreement of June 11, 1914, hereinabove referred to as The Family Settlement Agreement, and said Trust Agreement hereinabove and in said Family Settlement Agreement referred to as Exhibit E, so made with The Northern Trust Company in pursuance of said Family Settlement Agreement, as aforesaid, The Northern Trust Company became a Trustee for and on behalf of each of the parties to said agreement for the collection and application of the income from said securities so deposited with it as aforesaid, and that it became and was the duty of The Northern Trust Company, as such Trustee, to collect and apply the income from said securities so held by it as aforesaid, and, in case of a deficiency in the income therefrom, to collect from the parties to said Family Settlement Agreement any deficiency which might or should arise between the amounts for which they became and were severally liable as aforesaid, and their respective shares of the income received from the securities so deposited by them respectively, as aforesaid; that by the express terms both of said Family Settlement Agreement, so-called, and said Trust Agreement made in pursuance thereof and bearing even date therewith, the same were made binding upon and to inure to the benefit of the parties thereto and their respective heirs, executors, administrators and assigns.

"7. The Court further finds that The Northern Trust Company accepted the trusts in and by said agreement of December 2, 1912, and said trust agreement of June 11, 1914, imposed upon it, and thereafter continued to collect the income from said securities or the substitutes therefor so transferred to and held by it under

Richard E. Crane, Jr.; one per cent. per annum upon the income from the securities deposited under said agreement by Charles E. Crane up to March 18, 1914, and thereafter two and one-half per cent. per annum upon the income from said securities so deposited by Charles

R. Crane.

"6. The Court further finds that by the terms and by

reason of the said Agreement of June 11, 1914, hereinabove referred

to as the Family Settlement Agreement, and said Trust Agreement

hereinabove and in said Family Settlement Agreement referred to as

Exhibit E, so made with the Northern Trust Company in pursuance of

said Family Settlement Agreement, as aforesaid, the Northern Trust

Company became a Trustee for and on behalf of each of the parties

to said agreement for the collection and application of the income

from said securities so deposited with it as aforesaid, and that

it became and was the duty of the Northern Trust Company, as such

Trustee, to collect and apply the income from said securities so

held by it as aforesaid, and, in case of a deficiency in the income

therefrom, to collect from the parties to said Family Settlement

Agreement any deficiency which might or should arise between the

amounts for which they became and were severally liable as aforesaid,

and their respective shares of the income received from the securities

so deposited by them respectively, as aforesaid; that by the express

terms both of said Family Settlement Agreement, so-called, and said

Trust Agreement made in pursuance thereof and bearing even date

therewith, the same were made binding upon and to inure to the

benefit of the parties thereto and their respective heirs, executors,

administrators and assigns.

"7. The Court further finds that the Northern Trust

Company accepted the trusts in and by said agreement of December 2,

1912, and said Trust Agreement of June 11, 1914, imposed upon it,

and thereafter continued to collect the income from said securities

or the substitutes therefor so transferred to and held by it under

said Marriage Settlement Agreement and said Agreements of December 2, 1912 and of June 11, 1914, and paid the net income therefrom to the widow of * * * Crane, Sr., quarterly, in accordance therewith, and that up to and until June 2, 1932, the net income so collected and received by The Northern Trust Company as such Trustee from said securities, together with the income from the Atchison Railroad bonds, was sufficient to pay in full said annuity so agreed to be paid to Emily H. Junkin, formerly Emily H. Crane * * *.

"8. The Court further finds that by reason of the premises Charles R. Crane and Richard T. Crane, Jr., during his lifetime, and the Estate of Richard T. Crane, Jr., after his death and until the expiration of the period of one year from the date of Letters Testamentary issued to the Executors of his Will, remained primarily liable to Emily H. Junkin, each for one-half of whatever deficit might arise in the amount due and payable to Emily H. Junkin under and by virtue of said Agreement of December 2, 1912, as modified by said Agreement of June 2, 1922.

"That by reason of the Family Settlement Agreement of June 11, 1914, and the Trust Agreement therein referred to and bearing even date therewith, each of the defendants, Kate C. Gartz, Frances C. Lillie, Mary C. Russell, Emily C. Chadbourne and Herbert P. Crane became severally liable to Emily H. Junkin and to The Northern Trust Company as Trustee, each for one-seventh of any deficit which might become due and payable under and by virtue of the terms of said contract of December 2, 1912, by and between Charles R. Crane and Richard T. Crane, Jr., and Emily H. Crane, now Emily H. Junkin, unaffected by the modification of said agreement as between Charles R. Crane and Richard T. Crane, Jr., pursuant to said Agreement of June 2, 1922.

"9. The Court further finds that by reason of the passing of its dividend by said Crane Company on March 15, 1932, and thereafter and until December 15, 1937, the income from said securities

said Marriage Settlement Agreement and said Agreement of December 2, 1912 and of June 11, 1914, and paid the net income therefrom to the widow of ** * Crane, Sr., quarterly, in accordance therewith, and that up to and until June 2, 1932, the net income so collected and received by The Northern Trust Company as such Trustee from said securities, together with the income from the Atlantic Railroad bonds, was sufficient to pay in full said annuity as agreed to be paid to Emily M. Tamm, formerly Emily M. Crane, ** *.

"8. The Court further finds that by reason of the promises Charles M. Crane and Richard M. Crane, Jr., during his lifetime, and the Estate of Richard T. Crane, Jr., after his death and until the expiration of the period of one year from the date of Letters Testamentary issued to the Executors of his Will, remained primarily liable to Emily M. Tamm, each for one-half of whatever deficit might arise in the amount due and payable to Emily M. Tamm under and by virtue of said Agreement of December 2, 1912, as modified by said Agreement of June 2, 1914.

"That by reason of the Family Settlement Agreement of June 11, 1914, and the Trust Agreement therein referred to and bearing even date therewith, each of the defendants, Kate C. Gutz, Frances M. Miller, Mary C. Russell, Emily C. Lawrence and Robert M. Crane, became severally liable to Emily M. Tamm and to The Northern Trust Company as Trustee, each for one-seventh of any deficit which might become due and payable under and by virtue of the terms of said contract of December 2, 1912, by and between Charles M. Crane and Richard M. Crane, Jr., and Emily M. Crane, now Emily M. Tamm, unaffected by the modification of said agreement as between Charles M. Crane and Richard T. Crane, Jr., pursuant to said Agreement of June 2, 1914.

"9. The Court further finds that by reason of the passing of its dividend by said Crane Company on March 15, 1932, and thereafter and until December 15, 1937, the income from said securities

in the hands of The Northern Trust Company as such Trustee, as aforesaid, together with the income from said bonds of the Atchison * * * Railroad Company, became insufficient to pay said annuity so agreed to be paid to * * * Emily H. Junkin, as aforesaid, in full. That separate accounts were kept by The Northern Trust Company, as such trustee, as aforesaid, with each of said parties to said Trust Agreement of June 11, 1914, as therein provided, which said accounts were rendered to each of said parties, quarter-yearly, and that thereafter demand was made by The Northern Trust Company, as such Trustee, upon each of said parties, quarterly, from time to time, for his or her share of such deficit in accordance with the duties imposed upon it by said Agreements. That their obligation to pay their respective shares of such deficit was from time to time fully recognized by each of said parties and full or partial payments were thereafter made by them. That on October 16, 1931, defendant, Kate C. Gartz, sold, assigned and transferred to the defendant, A. F. Gartz, Jr., all her right, title and interest, as beneficiary or otherwise, in, to or under said Trust Agreement of June 11, 1914, above mentioned, but that said assignment was made by Kate C. Gartz to A. F. Gartz, Jr., as Trustee, and was not intended to and did not impose upon him, A. F. Gartz, Jr., any personal obligation to make the payments in and by said Family Settlement Agreement assumed by Kate C. Gartz, but that Kate C. Gartz personally and the securities so deposited by her with The Northern Trust Company, as Trustee, remained liable and chargeable with her respective portion of whatever deficit may now exist or may from time to time hereafter arise on account of her agreement to pay such one-seventh share of any such deficit as aforesaid, as in said Family Settlement Agreement * * * provided.

"The Court further finds that Emily C. Chadbourne has likewise fully recognized her obligation to pay one-seventh of any such deficit upon the basis hereinbefore stated, and that by virtue thereof she likewise is personally liable and the securities deposited by her with said Trustee are chargeable with her share of such deficit,

in the hands of the Northern Trust Company at such times, as
aforesaid, together with the income from said bonds of the Atlantic
* * * Railroad Company, became insufficient to pay said annuity so
agreed to be paid to * * * Emily A. Gordon, as aforesaid, in full.
That certain amounts were paid by the Northern Trust Company, as
such Trustee, as aforesaid, with each of said parties to said Trust
Agreement of June 11, 1914, as therein provided, which said amounts
were rendered to each of said parties, severally, and that
thereafter demand was made by the Northern Trust Company, as such
Trustee, upon each of said parties, severally, from time to time, for
his or her share of such deficit in accordance with the duties imposed
upon it by said agreement. That their obligation to pay their re-
spective shares of such deficit was from time to time fully recognized
by each of said parties and full or partial payments were therefor
made by them. That on or after June 11, 1914, the same, with
sold, assigned and transferred to the defendant, A. F. Gordon, Jr., all
her right, title and interest, as beneficially or otherwise, in, to or
under said Trust Agreement of June 11, 1914, above mentioned, but
that said assignment was made by Kate C. Gordon to A. F. Gordon, Jr.,
as Trustee, and was not intended to and did not impose upon him,
A. F. Gordon, Jr., any personal obligation to make the payments in and
for said Emily's maintenance agreement entered up June 11, 1914, but that
Kate C. Gordon personally and the securities so deposited by her with
the Northern Trust Company, as Trustee, remained liable and charge-
able with her respective portion of whatever deficit may now exist
on any from time to time thereafter with or without of her agreement
to pay such one-seventh share of any such deficit as aforesaid, as
in said Emily's maintenance agreement * * * provided.
* * * The Court further finds that Emily A. Gordon was like-
wise fully recognized her obligation to pay one-seventh of any such
deficit upon the facts heretofore stated, and that by virtue thereof
she likewise is personally liable and the securities deposited by
her with said Trustee are chargeable with her share of such deficit.

if any, as may now exist, and of such deficit, if any, as may hereafter from time to time during the lifetime of Emily H. Junkin arise and become due and payable to her.

"10. The Court further finds that on November 7, 1931, Richard T. Crane, Jr. died testate, and on January 20, 1932, his Will was admitted to probate in the Probate Court of Cook County, Illinois, and Letters Testamentary were issued thereon to Cornelius Crane, John K. Prentice, Walter Evensen, and the Continental Illinois Bank and Trust Company as Executors thereof; that thereafter the said Walter Evensen resigned as such co-executor; that no successor to him as such co-executor has been appointed, and that the said Cornelius Crane, John K. Prentice, and said Continental Illinois Bank and Trust Company accepted their appointment and have since acted as such Executors of the Will of Richard T. Crane, Jr.

"11. The Court further finds that on December 2, 1932, the deficit in the amount due to Emily H. Junkin under the contract of December 2, 1912, and said Supplemental Contract of June 2, 1922, with Charles R. Crane and Richard T. Crane, Jr., as aforesaid, as shown by the accounts rendered by The Northern Trust Company as Trustee, amounted to the sum of \$14,262.53 for one-half of which, viz., \$7,137.27, a claim was filed by or by the direction of The Northern Trust Company, as Trustee, in the name of Emily H. Junkin, against the Estate of Richard T. Crane, Jr., in the said Probate Court. That thereafter and before the expiration of the period of administration of said estate of Richard T. Crane, Jr., * * * the same was paid in full, one-seventh thereof by said Executors of the Will of Richard T. Crane, Jr. and the remaining six-sevenths thereof from payments made by the other parties to said Family Settlement Agreement, or some of them, in accordance therewith.

"12. The Court further finds that under and by virtue of said contract hereinabove referred to as the Family Settlement Agreement * * * and the Trust Agreement bearing even date therewith, so made and entered into with The Northern Trust Company, as Trustee,

it any, as may now exist, and of such deficit, if any, as may here-
after from time to time during the lifetime of Emily H. Franklin arise
and become due and payable to her.

"10. The Court further finds that on November 7, 1931,
Richard T. Crane, Jr. died testate, and on January 22, 1932, his
Will was admitted to probate in the Probate Court of Cook County,
Illinois, and lastly, testator's will named Charles M. Crane as
Crane, John K. Francis, Walter Hysen, and the Continental Illinois
Bank and Trust Company as Executors thereof; that thereafter the
said Walter Hysen resigned as such co-executor; that no successor
to him as such co-executor has been appointed, and that the said
Cornelius Crane, John K. Francis, and said Continental Illinois
Bank and Trust Company accepted their appointment and have since
acted as such Executors of the Will of Richard T. Crane, Jr.

"11. The Court further finds that on December 2, 1932,
the deficit in the amount due to Emily H. Franklin under the contract
of December 2, 1912, and said Supplemental Contract of June 2, 1932,
with Charles M. Crane and Richard T. Crane, Jr., as aforesaid, as
shown by the accounts rendered by The Northern Trust Company as
Trustee, amounted to the sum of \$14,462.73 for one-half of which
via \$7,131.37, a claim was filed by or by the direction of The
Northern Trust Company, as Trustee, in the name of Emily H. Franklin,
against the Estate of Richard T. Crane, Jr., in the said Probate
Court. That thereafter and before the expiration of the period of
administration of said estate of Richard T. Crane, Jr., the
same was paid in full, one-seventh thereof by said Executors of the
Will of Richard T. Crane, Jr. and the remaining six-sevenths thereof
from payments made by the other parties to said Family Settlement
Agreement, or some of them, in accordance therewith.

"12. The Court further finds that under and by virtue
of said contract heretofore referred to as the Family Settlement
Agreement * * * and the Trust Agreement bearing even date therewith,
so made and entered into with The Northern Trust Company, as Trustee,

both Emily M. Junkin, for whose benefit said contracts were made, and The Northern Trust Company, as Trustee, became and were severally entitled to enforce the obligations in and by said agreements assumed by the several parties thereto, and that it thereupon became and was the duty of The Northern Trust Company, as Trustee, to enforce the respective obligations of the parties to said respective agreements.

"13. * * * [In paragraph 13 the court makes findings in reference to certain proceedings in the Probate court of Cook county in the matter of the estate of Richard T. Crane, Jr.]

"14. The Court further finds that the jurisdiction of the said Probate Court in the Matter of the Estate of Richard T. Crane, Jr., is limited and inadequate for the adjustment and enforcement of the equities of the several parties in interest herein, and especially to make suitable and adequate provision with respect to future deficits, if any, under said contract of December 2, 1912, and said Supplemental Agreement of June 2, 1922, as the same may hereafter arise; that no action has been taken in, nor order entered by said Probate Court in the Matter of said Petition so filed therein by * * * Emily M. Junkin nor upon the said claim of Charles R. Crane, hereinabove mentioned and referred to; that the power and jurisdiction of said Probate Court to establish a lien upon said 1,000 shares of stock of said Crane Company, which by the terms of the Will of Richard T. Crane, Jr., were bequeathed to Herbert P. Crane as a director of said Crane Company, or to control or dispose of the same pending the determination of the liability of Herbert P. Crane to the Estate of said Decedent growing out of the assumption by him of a portion of said alleged liability to Emily M. Junkin, is also doubtful and inadequate for the proper determination of the rights of the respective parties to such controversy, and that by reason thereof said plaintiffs properly filed in this Court their said complaint, and said distributees of the Estate of said Richard T. Crane, Jr., properly filed their counterclaim herein, for the purpose of having the rights and equities of the several parties

both Emily M. Junkin, for whose benefit said contracts were made, and The Northern Trust Company, as trustee, became and were severally entitled to enforce the obligations in and by said agreements assumed by the several parties thereto, and that it thereupon became and was the duty of The Northern Trust Company, as trustee, to enforce the respective obligations of the parties to said respective agreements.

"13. * * * [In paragraph 1] the court makes findings in

reference to certain proceedings in the Probate Court of Cook County in the matter of the estate of Richard T. Crane, Jr.]

"14. The Court further finds that the jurisdiction of the said Probate Court in the Matter of the Estate of Richard T. Crane, Jr., is limited and inadequate for the adjustment and enforcement of the equities of the several parties in interest therein, and especially to make suitable and adequate provision with respect to future deficits, if any, under said contract of December 2, 1912, and said Supplemental Agreement of June 2, 1913, as the same may hereafter arise; that no action has been taken in, nor order entered by said Probate Court in the Matter of said Petition as filed therein

by * * * Emily M. Junkin nor upon the said claim of Charles R. Crane, hereinabove mentioned and referred to; that the power and jurisdiction of said Probate Court to establish a lien upon said 1,000 shares of stock of said Crane Company, which by the terms of the Will of Richard T. Crane, Jr., were bequeathed to Herbert R. Crane as a director of said Crane Company, or to control or dispose of the same pending the determination of the liability of Herbert R. Crane to the Estate of said decedent growing out of the assumption by him of a portion of said alleged liability to Emily M. Junkin, is also doubtful and inadequate for the proper determination of the rights of the respective parties to such controversy, and that by reason thereof said plaintiff's property filed in this Court their said complaint, and said distributees of the Estate of said Richard T. Crane, Jr., properly filed said complaint herein for the purpose of having the rights and equities of the several parties

in interest herein properly and fully adjudicated and enforced.

"15. The Court further finds that on December 2, 1937, the amount of the deficit payable to Emily M. Junkin under said contract of December 2, 1912, and said Supplemental Agreement of June 2, 1922, was the sum of \$83,897.01, exclusive of Attorney's fees, costs and expenses incurred by said Trustee in connection with the filing of said claim and the petition in the name and on behalf of Emily M. Junkin, as aforesaid, and in this proceeding, and exclusive of any additional compensation to said Trustee for its services, for one-half of which sum, together with such Attorney's fees, costs and additional compensation to said Trustee, Charles R. Crane became and is primarily liable, and for the other half of which the said distributees of the Estate of Richard T. Crane, Jr., became and are primarily liable to the extent of the assets of said estate so received by them, respectively, as aforesaid; that under and in pursuance of said Family Settlement Agreement and said Trust Agreement of June 11, 1914, the said distributees of the Estate of Richard T. Crane, Jr., became in equity liable as between themselves and Charles R. Crane for six-sevenths of such deficit; that the shares of such deficit for which defendants, Kate C. Gartz, Frances C. Lillie, Mary C. Russell, Emily C. Chadbourne, and Herbert P. Crane, respectively, became and were liable, were as follows, viz.:

| | |
|--------------------------|-------------|
| Kate C. Gartz..... | \$23,688.04 |
| Frances C. Lillie..... | 2,916.64 |
| Mary C. Russell..... | 11,791.56 |
| Emily C. Chadbourne..... | 5,896.00 |
| Herbert P. Crane..... | 44,604.77 |

making said total deficit the sum of.....\$88,897.01

"That said Frances C. Lillie, Mary C. Russell and Emily C. Chadbourne have each paid their respective shares of said deficit in full, exclusive of the additional compensation to said Trustee, and of the legal costs and attorney's fees incurred by said Trustee, as hereinafter stated.

"That the share of said deficit so due on December 2, 1937, and remaining unpaid, for which Kate C. Gartz was then liable, is the

in interest herein properly and fairly adjusted and ascertained.

"17. The Court further finds that on or about 2, 1937, the amount of the deficit payable to Emily M. Crane under said contract of December 2, 1914, and said supplemental agreement of June 2, 1932, was the sum of \$33,897.61, exclusive of attorney's fees, costs and expenses incurred by said Trustee in connection with the filing of said claim and the payment of the same and on behalf of Emily M. Crane, as aforesaid, and in this proceeding, and exclusive of any additional compensation to said Trustee for its services, for one-half of which sum, together with such attorney's fees, costs and additional compensation to said Trustee, Charles M. Crane became and is primarily liable, and for the other half of which the said distributess of the Estate of Richard T. Crane, Jr., became and are primarily liable to the extent of the assets of said estate so received by them, respectively, as aforesaid; that under and in pursuance of said Family Settlement Agreement and said Trust Agreement of June 11, 1914, the said distributess of the Estate of Richard T. Crane, Jr., became in equity liable as between themselves and Charles M. Crane for six-sevenths of such deficit; that the shares of such deficit for which defendants, Kate C. Garza, Frances C. Garza, Emily M. Crane, and Charles M. Crane, were as follows, viz:

| | | |
|------------------|--------------|--------------------|
| Emily M. Crane | | \$11,295.54 |
| Charles M. Crane | | 11,295.54 |
| Kate C. Garza | | 11,295.54 |
| Frances C. Garza | | 11,295.54 |
| Emily O. Garza | | 11,295.54 |
| Robert E. Garza | | 11,295.54 |
| Total | | \$67,077.70 |

And the Court further finds the sum of \$33,897.61

"That said Frances C. Garza, Emily O. Garza and Emily O. Garza have each paid their respective shares of said deficit in full, exclusive of the additional compensation to said Trustee, and of the legal costs and attorney's fees incurred by said Trustee, as previously stated.

"That the share of said deficit so due on December 2, 1937, and remaining unpaid, for which Kate C. Garza was then liable, is the

of
sum of \$23,688.04 as aforesaid. That said Trustee has since collected from dividends received by it on the stock of Crane Company deposited with said Trustee by Kate C. Gartz and now held by it as provided by said Family Settlement Agreement of June 11, 1914, and the Trust Agreement of same date, hereinbefore mentioned and referred to as Exhibit E, the sum of \$18,536.56, which has been applied in reduction of the said sum of \$23,688.04 so due from said Kate C. Gartz, leaving a balance of \$5,151.48 still remaining due from her as of said December 2, 1937, in addition to her one-seventh share of the additional compensation to said Trustee and its legal costs and Attorney's fees, as hereinafter stated.

"* * * That said trustee has since collected from dividends received by it on the stock of Crane Company deposited with said Trustee by Herbert P. Crane and now held by it as provided by said Family Settlement Agreement of June 11, 1914, and the Trust Agreement of same date, hereinbefore mentioned and referred to as Exhibit E, the sum of \$18,536.57, which has been applied in reduction of the said sum of \$44,604.77, so due from Herbert P. Crane, leaving a balance of \$26,068.20 still remaining due from him as of December 2, 1937, for which sum, together with one-seventh of the additional compensation hereinafter found due and payable to The Northern Trust Company, as Trustee, and its legal costs and Attorney's fees, said plaintiffs are entitled to a decree and judgment as at law against defendant Herbert P. Crane.

"16. The Court further finds that by reason of the premises and by reason of the deficits so accruing, as aforesaid, and by reason of the death of Richard T. Crane, Jr., The Northern Trust Company, as Trustee, as aforesaid, became and was obliged to perform additional services not contemplated by the parties thereto at the time that said Agreement of December 2, 1912, and said Family Settlement Agreement of June 11, 1914, were made and entered into, and that said Trustee is entitled to additional compensation for such services, which the Court finds to be the sum of \$3,250, being at the rate of \$500 per

of \$23,488.04 as aforesaid. That said trustee has since collected from dividends received by it on the stock of Crane Company deposited with said trustee by Kate C. Burke and now held by it as provided by said Family Settlement Agreement of June 11, 1914, and the Trust Agreement of same date, hereinafter mentioned and referred to as Exhibit W, the sum of \$18,756.75, which has been applied in reduction of the said sum of \$23,488.04 so due from said Kate C. Burke, leaving a balance of \$4,731.29 still remaining due from her as of said December 2, 1917, in addition to her one-seventh share of the additional compensation to said Trustee and its legal costs and attorney's fees, as hereinafter stated.

"* * * That said trustee has since collected from dividends received by it on the stock of Crane Company deposited with said Trustee by Herbert P. Crane and now held by it as provided by said Family Settlement Agreement of June 11, 1914, and the Trust Agreement of same date, hereinafter mentioned and referred to as Exhibit W, the sum of \$18,756.75, which has been applied in reduction of the said sum of \$44,604.77, so due from Herbert P. Crane, leaving a balance of \$25,848.02 still remaining due from him as of December 2, 1917, for which sum, together with one-seventh of the additional compensation hereinafter found due and payable to The Northern Trust Company, as Trustee, and its legal costs and attorney's fees, said plaintiffs are entitled to a decree and judgment as at law against defendant Herbert P. Crane.

"16. The Court further finds that by reason of the promises and by reason of the deficits so accruing, as aforesaid, and by reason of the acts of Robert P. Crane, Jr., The Northern Trust Company, as Trustee, as aforesaid, became and was obliged to perform additional services not contemplated by the parties thereto at the time that said Agreement of December 2, 1912, and said Family Settlement Agreement of June 11, 1914, were made and entered into, and that said Trustee is entitled to additional compensation for such services, which the Court finds to be the sum of \$3,450, being at the rate of \$100 per

year for the period from December 2, 1931 to June 2, 1938; that said Trustee was also obliged to employ and did employ counsel to advise it with respect to its duties as such Trustee in connection with the enforcement of the several obligations of the several parties to said contracts during the same period, and that said Trustee is entitled to be compensated for the reasonable fees of counsel so employed by it for the purpose aforesaid, which the Court finds to be the sum of \$8,500, which said additional compensation of said Trustee, together with its legal costs herein, amounting to the sum of \$42.49, and Attorney's fees, as aforesaid, constitute a proper charge upon the trust funds so held by said Trustee as aforesaid.

"17. The Court further finds that by reason of the premises, as hereinabove stated and set forth, it became and was necessary for said defendants, Cornelius Crane, John K. Prentice, Charles G. King, William R. Odell, and Continental Illinois National Bank and Trust Company of Chicago, and Florence H. Crane, as distributees of the Estate of Richard T. Crane, Jr., and also for defendant, Charles R. Crane, to file herein their counterclaims against the other parties to said Agreement of June 11, 1914, for the purpose of determining their liabilities, respectively, as between themselves, in accordance with the provisions of said contracts of December 2, 1912, and June 11, 1914, and said Supplemental Agreement of June 2, 1922, and that said counterclaims were properly so filed, and should be sustained.

"18. The Court further finds that said distributees of the Estate of Richard T. Crane, Jr., are entitled to a decree herein directing the payment by said defendants, Kate C. Gartz, Frances C. Lillie, Mary C. Russell, Emily C. Chadbourne and Herbert F. Crane, respectively, of their respective shares of the existing deficit so far as their said shares have not heretofore been paid by them, together with their respective one-seventh shares of all deficits which may hereafter, during the lifetime of Emily H. Junkin, become due and payable, for the six-sevenths of which said distributees are

year for the period from December 3, 1911 to June 3, 1936; that said Trustee was also obliged to employ and did employ counsel to advise it with respect to its duties as such Trustee in connection with the enforcement of the several obligations of the several parties to said contracts during the same period; and that said Trustee is entitled to be compensated for the reasonable fees of counsel so employed by it for the purpose aforesaid, which the Court finds to be the sum of \$8,700, which said additional compensation of said Trustee, together with its legal costs herein, amounting to the sum of \$42.49, and Attorney's fees, as aforesaid, constitute a proper charge upon the trust funds so held by said Trustee as aforesaid.

"17. The Court further finds that by reason of the premises, as hereinabove stated and set forth, it became and was necessary for said defendants, Cornelius Crane, John K. Francis, Charles A. King, William F. Scott, and Continental Illinois National Bank and Trust Company of Chicago, and Florence M. Crane, as distributees of the Estate of Richard T. Crane, Jr., and also for defendant, Charles R. Crane, to file herein their counterclaims against the other parties to said Agreement of June 11, 1914, for the purpose of determining their liabilities, respectively, as between themselves, in accordance with the provisions of said contracts of December 2, 1912, and June 11, 1914, and said supplemental Agreement of June 2, 1922, and that said counterclaims were properly so filed, and should be sustained.

"18. The Court further finds that said distributees of the Estate of Richard T. Crane, Jr., are entitled to a decree herein directing the payment by said defendants, John K. Francis & Charles A. King, William F. Scott, and Continental Illinois National Bank and Trust Company, respectively, of their respective shares of the existing deficit so far as their said shares have not heretofore been paid by them, to- gether with their respective one-seventh parts of all deficits which may heretofore, during the lifetime of Emily M. Umble, become due and payable, for the six-sevenths of which said distributees are

primarily liable as aforesaid, as between themselves and defendant, Charles R. Crane, who is liable as between himself and Emily H. Junkin and The Northern Trust Company, as Trustee, for one-half of such deficits, but who is liable, as between himself and said distributees for only one-seventh of such deficits. That Charles R. Crane is entitled to the order and decree of this court requiring said distributees and Kate C. Gartz, Frances C. Lillie, Emily C. Chadbourne, Mary C. Russell, and Herbert P. Crane to pay and satisfy, to the extent they are respectively liable therefor, any and all deficits now existing or hereafter arising, other than the one-seventh part thereof, for which Charles R. Crane has remained liable under said Family Settlement Agreement and other Agreements, in exoneration of the liability of Charles R. Crane to Emily H. Junkin under and by virtue of said Agreement of December 2, 1912.

"19. The Court finds that Frances C. Lillie, Mary C. Russell and Emily C. Chadbourne have never denied their liabilities under the contracts hereinbefore mentioned or refused to pay their respective shares of the amounts due or payable to or for Emily H. Junkin, nor has any of them ever claimed to be entitled to any reduction in amount of their respective liabilities by reason of said contract of June 2, 1922, which reduced the amount to be paid to Emily H. Junkin from \$100,000 per year to \$85,000 per year, nor prior to the beginning of this suit had there been any controversy between plaintiffs and Frances C. Lillie, Mary C. Russell and Emily C. Chadbourne, except Frances C. Lillie's objection to attorneys' fees of plaintiffs; that, from time to time, when they were notified of the respective amounts due from or payable by them respectively, Frances C. Lillie, Mary C. Russell and Emily C. Chadbourne, with reasonable promptness, always paid the amounts due from or payable by them respectively, that they owe no part of said sum of \$88,897.01 of deficit due December 2, 1937; that up to and including June 2, 1938, they have paid in full all sums claimed from them, except

primarily liable as aforesaid, as between themselves and defendant,
Charles R. Crane, who is liable as between himself and Emily M.
Junkin and The Northern Trust Company, as trustee, for one-half of
such deficits, but who is liable, as between himself and said dis-
tributees for only one-seventh of such deficits. That Charles R.
Crane is entitled to the order and decree of this court regarding
said distributees and Kate C. Garza, Frances C. Millie, Emily C.
Chadbourne, Mary C. Russell, and Herbert F. Crane to pay and satisfy,
to the extent they are respectively liable therefor, any and all
deficits now existing or hereafter arising, other than the one-seventh
part thereof, for which Charles R. Crane has assumed liability under
said Family Settlement Agreement and other agreements, in exoneration
of the liability of Charles R. Crane to Emily M. Junkin under and by
virtue of said Agreement of December 2, 1935.
That the Court finds that Frances C. Millie, Mary C.
Russell and Emily C. Chadbourne have never denied their liabilities
under the contracts heretofore mentioned or refused to pay their
respective shares of the amounts due or payable to or for Emily M.
Junkin, nor has any of them ever claimed to be entitled to any
reduction in amount of their respective liabilities by reason of
said contract of June 2, 1932, which reduced the amount to be paid
to Emily M. Junkin from \$100,000 per year to \$87,000 per year, nor
prior to the beginning of this suit had there been any controversy
between plaintiffs and Frances C. Millie, Mary C. Russell and Emily
C. Chadbourne, except Frances C. Millie's objection to attorneys'
fees of plaintiffs; that, from time to time, when they were notified
of the respective amounts due from or payable by them respectively,
Frances C. Millie, Mary C. Russell and Emily C. Chadbourne, with
reasonable promptness, always paid the amounts due from or payable
by them respectively, and they owe no part of said sum of \$87,000.00
of deficits due December 2, 1935; that up to and including June 2,
1936, they have paid in full all sums claimed from them, except

amount claimed for attorneys' fees of plaintiffs and amount claimed for 'additional compensation' of The Northern Trust Company for services in the matter of collecting from members of the Crane family for Emily H. Junkin sums of money not derived from the trust funds held by The Northern Trust Company as Trustee; that the statement of account of The Northern Trust Company heretofore filed herein shows all shares of deficits to June, 1938, that were at any time due or owing from defendants, Frances C. Lillie, Mary C. Russell or Emily C. Chadbourne, were paid in full and that The Northern Trust Company then held in account to credit of

| | |
|--------------------------|-------------|
| Frances C. Lillie..... | \$10,622.91 |
| Mary C. Russell..... | 13,478.39 |
| Emily C. Chadbourne..... | 7,582.39 |

\$31,683.69 ①

"The Court finds that The Northern Trust Company has already received and taken for fees for its services in the matter of payments to Emily H. Junkin under the provisions of the contracts herein mentioned, two and one-half per cent. of the amounts received from interest derived from the Union Pacific Bonds and the dividends from Pullman Company stock held in the principal accounts, and one per cent. of the dividends from the Crane Company stock held in the several trusts of Frances C. Lillie, Mary C. Russell, Emily C. Chadbourne, Kate C. Gartz and Herbert P. Crane, and in addition such sums as were paid by Charles R. Crane, Richard T. Crane, Jr., and the distributees of the estate of Richard T. Crane, Jr., deceased, for fees, and these fees for the whole period amount to the sum of \$34,312.81; that defendants, Frances C. Lillie, Mary C. Russell and Emily C. Chadbourne, each has already contributed to the fees of The Northern Trust Company from December 2, 1919, to June 2, 1938, the sum of \$5,298.51; that Frances C. Lillie has from the beginning protested against the payment of attorneys' fees of plaintiffs and that Frances C. Lillie and Mary C. Russell have from the beginning of this suit protested against paying to The Northern Trust Company Trustee's fees or attorneys' fees for filing or litigating claim against the

amount claimed for attorneys' fees of plaintiffs and amount claimed for 'additional compensation' of the Northern Trust Company for services in the matter of collecting from members of the Grane family for Emily M. Tunkin sums of money not derived from the trust lands held by The Northern Trust Company as trustee; that the state-

ment of account of the Northern Trust Company, introduced in evidence herein shows all shares of defendants to June, 1938, that were at any time due or owing from defendants, Frances C. Lillie, Mary C. Russell or Emily C. Chabourne, were paid in full and that the Northern Trust Company then held in account to credit of

Frances C. Lillie.....\$1,200.00
 Mary C. Russell.....\$1,200.00
 Emily C. Chabourne.....\$1,200.00

\$3,600.00

"The Court finds that The Northern Trust Company has already received and taken for its services in the matter of payments to Emily M. Tunkin under the provisions of the contracts herein mentioned, two and one-half per cent. of the amounts received from interest derived from the Union Pacific Bonds and the dividends from Pullman Company stock held in the principal accounts, and one per cent. of the dividends from the Grane Company stock held in the several trusts of Frances C. Lillie, Mary C. Russell, Emily C.

Chabourne; Kate C. Garza and Herbert P. Grane, and in addition such sums as were paid by Charles R. Grane, Richard T. Grane, Jr., and the distributees of the estate of Richard T. Grane, Jr., deceased, for fees, and these fees for the whole period amount to the sum of \$34,312.81; that defendants, Frances C. Lillie, Mary C. Russell and Emily C. Chabourne, were lawfully contributed to the fees of The Northern Trust Company from December 1, 1929, to June 1, 1938, the sum of \$3,600.00; that Frances C. Lillie and Mary C. Russell have protested against the payment of attorneys' fees of plaintiffs and that Frances C. Lillie and Mary C. Russell have from the beginning of this suit protested against paying to The Northern Trust Company trustee's fees or attorneys' fees for filing or litigating claim against the

estate of Richard T. Crane, Jr., deceased, or for litigating controversies with the distributees of the estate of Richard T. Crane, Jr., deceased, or for litigating controversies with Herbert P. Crane, Kate C. Gartz, or A. F. Gartz, Jr., Trustee, or for any services, except services with reference to the property held by The Northern Trust Company, as Trustee.

"20. The Court further finds that by order of this Court entered herein on July 1, 1938, The Northern Trust Company, as Trustee, was directed and ordered by the court to prepare and file herein its account covering the period from December 2, 1919, to and including July 9, 1938, and that said account was duly prepared and filed by The Northern Trust Company as Trustee, pursuant to said Order.

"21. The Court further finds that it has jurisdiction of the res and that it can control the entire trust funds so deposited with The Northern Trust Company, as Trustee, as hereinbefore stated, both the corpus of said trust funds and the income therefrom, together with the right to direct how the account of said Trustee shall be stated.

"That the Court has the right to take under its control any of the securities that are now in the jurisdiction of the Court, as aforesaid, in order to insure the payment of any existing or future deficits that may hereafter, at any time arise or accrue, on the basis hereinbefore stated, for which any of the parties hereto are now or shall hereafter become liable, regardless of whether personal service has been had herein on any of said defendants."

The decretal part of the decree is as follows:

"IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, and the Court hereby ORDERS, ADJUDGES AND DECREES:

"1. That the motions heretofore filed herein to dismiss the complaint and amended complaint of plaintiffs and the counterclaims of Charles R. Crane and of Cornelius Crane, John K. Prentice, Charles G. King, William R. Odell and Continental Illinois National Bank and Trust Company of Chicago, Trustees under the Will of Richard T. Crane, Jr., Deceased, and Florence M. Crane, be and the same are hereby denied.

estate of Richard T. Crane, Jr., deceased, or for litigating controversies with the distributees of the estate of Richard T. Crane, Jr., deceased, or for litigating controversies with Herbert F. Crane, late O. Garza, or A. F. Garza, Jr., Trustee, or for any services, except services with reference to the property held by the Northern Trust Company, as Trustee.

"20. The Court further finds that by order of this Court entered herein on July 1, 1938, The Northern Trust Company, as Trustee, was directed and ordered by the court to prepare and file herein its account covering the period from December 3, 1919, to and including July 9, 1938, and that said account was duly prepared and filed by The Northern Trust Company as Trustee, pursuant to said Order.

"21. The Court further finds that it has jurisdiction of the

res and that it can control the entire trust funds so deposited with The Northern Trust Company, as Trustee, as heretofore stated, both the corpus of said trust funds and the income thereon, together with the right to direct how the account of said Trustee shall be stated.

"That the Court has the right to take under its control any

of the execution thereof and is the jurisdiction of the Court, as aforesaid, in order to insure the payment of any existing or future deficits that may hereafter, at any time arise or accrue, on the basis heretofore stated, for which any of the parties hereto are now or shall hereafter become liable, regardless of whether personal service has been had herein on any of said defendants."

The decretal part of the decree is as follows:

"IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, and the Court hereby ORDERS, ADJUDGES AND DECREES:

"1. That the motions heretofore filed herein to dismiss the complaint and several complaints of defendants and the counterclaims of Charles F. Crane and of Cornelius Crane, John F. Trustee, Charles O. Kane, William H. Odell and Continental Illinois National Bank and Trust Company of Chicago, Trustee under the Will of Richard T. Crane, Jr., deceased, and Florence M. Crane, be and the same are hereby denied.

"2. That the quarterly accounts received in evidence heretofore rendered and stated by The Northern Trust Company, as Trustee, as aforesaid, to the several defendants with respect to the income received from the securities held by said Trustee, and the application of said income, as provided by the several agreements hereinbefore mentioned and referred to, be and the same are hereby approved.

"3. That all objections to the account heretofore filed herein by The Northern Trust Company as Trustee, be and the same are hereby overruled and said account be and the same is hereby approved.

"4. That said Trustee continue to keep separate accounts with the defendants to said complaint, other than the Executors of the Will of Richard T. Crane, Jr. and A. F. Gartz, Jr., upon the basis hereinbefore stated and approved, with respect to the income from the securities so held by it as aforesaid, including the income from said Atchison bonds, subsequent to December 2, 1937, and to collect and pay over such income to Emily H. Junkin quarterly, as in said Agreement of December 2, 1912 provided, to the extent and amount and at the rate of \$85,000 per annum, during her lifetime, and at the same rate for the portion of any year hereafter, beginning with December 2, 1937, prior to her death; statements of account to be rendered quarterly to each of the parties defendant herein, their legal representatives or assigns.

"5. That said Trustee continue to charge against defendants, Kate C. Gartz, Frances C. Lillie, Mary C. Russell, Emily C. Chadbourne, Herbert P. Crane, Charles R. Crane and said Cornelius Crane, John K. Prentice, Charles G. King, William R. Odell and Continental Illinois National Bank and Trust Company of Chicago, Trustees under the Will of Richard T. Crane, Jr., Deceased, and Florence H. Crane, distributees of the Estate of said Richard T. Crane, Jr., or their respective heirs, legal representatives or assigns, the several one-seventh shares of any deficit which may exist on any December 2nd of any year for which such defendants are hereinbefore found liable; that Charles R. Crane and said distributees of the Estate of Richard T. Crane, Jr. each be credited by said Trustee upon their primary liability, respectively,

"2. That the quarterly accounts received in evidence here-

before rendered and stated by The Northern Trust Company, as Trustee,

as aforesaid, to the several defendants with respect to the income

received from the securities held by said Trustee, and the application

of said income, as provided by the several agreements heretofore men-

tioned and referred to, be and the same are hereby approved.

"3. That all objections to the account heretofore filed

herein by The Northern Trust Company as Trustee, be and the same are

hereby overruled and said account be and the same is hereby approved.

"4. That said Trustee continue to keep separate accounts

with the defendants to said complaint, other than the Executors of

the Will of Richard T. Crane, Jr. and A. T. Carter, Jr., upon the basis

heretofore stated and approved, with respect to the income from the

securities so held by it as aforesaid, including the income from said

assigned bonds, subsequent to payment of 1911, and so collect and

pay over such income to Emily H. Junkin quarterly, as in said agreement

of December 2, 1912 provided, to the extent and amount and at the rate

of \$87,000 per annum, during her lifetime, and at the same rate for

the portion of any year subsequent to December 2, 1912,

prior to her death; statements of account to be rendered quarterly to

each of the parties defendants herein, their legal representatives

or assigns.

"5.

That said Trustee continue to charge against defendants,

Kate C. Carter, Frances C. Millie, Mary C. Russell, Emily C. Chubbuck,

Herbert P. Crane, Charles R. Crane and said Cornelia Crane, John R.

Proffice, Charles G. King, William R. Obell and Continental Illinois

National Bank and Trust Company of Chicago, Trustees under the Will of

Richard T. Crane, Jr., Deceased, and Florence H. Crane, distributees of

the Estate of said Richard T. Crane, Jr., or their respective heirs,

legal representatives or assigns, the several one-seventh shares of any

deficit which may exist on any December 2nd of any year for which such

defendants are heretofore found liable; that Charles R. Crane and

said distributees of the Estate of Richard T. Crane, Jr., each be

creditors by said Trustee upon their primary liability, respectively,

each for one-half of any such deficit, with the several amounts paid by such other defendants last above named, or received by said Trustee as dividends or income from securities by them deposited with or held by said Trustee from time to time, as provided by said Family Settlement Agreement and said Trust Agreement of June 11, 1914. That said Trustee in its accounts so to be hereafter rendered, charge said distributees of the Estate of said Richard T. Crane, Jr. and Charles R. Crane, respectively, with one-seventh of any deficit which may exist on December 2nd of any year from and after the date hereof, on the basis of the net income of \$85,000 per annum, so guaranteed by Charles R. Crane and Richard T. Crane, Jr., severally, one-half by each, under and in accordance with said Agreement of June 2, 1922, and that said Trustee in its said accounts charge Kate C. Gartz, Frances C. Lillie, Mary C. Russell, Emily C. Chadbourne and Herbert P. Crane each with one-seventh of any such deficit on the basis of the net income of \$100,000 per annum, so guaranteed by Charles R. Crane and Richard T. Crane, Jr., severally, one-half by each, under and in accordance with said Agreement of December 2, 1912.

"That defendants, Kate C. Gartz and Herbert P. Crane, pay to The Northern Trust Company, as Trustee, their respective portions of said deficit of \$88,897.01, as hereinbefore determined, not heretofore paid by them, or received by The Northern Trust Company as Trustee from the dividends from said shares of stock of said Crane Company so deposited by them respectively as aforesaid, and that said defendants, Kate C. Gartz, Frances C. Lillie, Mary C. Russell, Emily C. Chadbourne and Herbert P. Crane, ~~said defendants~~ from and after the date of the entry of this decree, pay, each to the extent of one-seventh thereof, any and all future deficits in satisfaction and discharge of their respective liabilities to said distributees of the estate of Richard T. Crane, Jr., to Charles R. Crane, to Emily H. Junkin, and to The Northern Trust Company, as Trustee, and in exoneration of the liability of said distributees and of Charles R. Crane to Emily H.

each for one-half of any such deficit, with the several amounts paid by such other defendants last above named, or received by said Trustee as dividends or income from securities by them deposited with or held by said Trustee from time to time, as provided by said Family Settlement Agreement and said Trust Agreement of June 11, 1914. That said Trustee in its accounts so to be hereafter rendered, charge said distributees of the Estate of said Richard T. Crane, Jr. and Charles R. Crane, respectively, with one-seventh of any deficit which may exist on December 31st of any year from and after the date hereof, on the basis of the net income of \$82,000 per annum, so guaranteed by Charles R. Crane and Richard T. Crane, Jr., severally, one-half by each, under and in accordance with said Agreement of June 2, 1912, and that said Trustee in its said accounts charge Kate C. Garza, Frances C. Lillie, Mary C. Russell, Emily V. Washington and Herbert P. Crane each with one-seventh of any such deficit on the basis of the net income of \$100,000 per annum, so guaranteed by Charles R. Crane and Richard T. Crane, Jr., severally, one-half by each, under and in accordance with said Agreement of December 2, 1912. That defendants, Kate C. Garza and Herbert P. Crane, pay to The Northern Trust Company, as Trustee, their respective portions of said deficit of \$38,327.01, as hereinbefore determined, not heretofore paid by them, or received by The Northern Trust Company as Trustee from the dividends from said shares of stock of said Crane Company so deposited by them respectively as aforesaid, and that said defendants, Kate C. Garza, Frances C. Lillie, Mary C. Russell, Emily V. Washington and Herbert P. Crane, each, discharge from and after the date of the entry of this decree, pay, each to the extent of one-seventh thereof, any and all future deficits in satisfaction and discharge of their respective liabilities to said distributees of the estate of Richard T. Crane, Jr., to Charles R. Crane, to Emily V. Washington, and to The Northern Trust Company, as Trustee, and in execution of the liability of said distributees and of Charles R. Crane to Emily V. Russell.

Junkin and to The Northern Trust Company, as Trustee, for or on account of such deficits to the extent of five-sevenths thereof, determined as hereinbefore provided, and that, to the extent of the value of the assets of the estate of Richard T. Crane, Jr. received by them, respectively, the said distributees pay to Emily H. Junkin, or to The Northern Trust Company as Trustee, in exoneration of the liability of Charles R. Crane therefor, six-sevenths of said deficit of \$88,897.01, or so much thereof as is not paid by defendants Kate C. Gartz and Herbert P. Crane, or either of them, (Frances C. Lillie, Mary C. Russell, and Emily C. Chadbourne having heretofore paid their respective portions of said deficit), and that, to the extent of the value of the assets of the estate of Richard T. Crane, Jr. received by them, respectively, said distributees further pay to the extent of six-sevenths thereof any and all future deficits. The foregoing language in Par. 5, shall not be construed to constitute a money judgment against Kate C. Gartz.

"6. IT IS FURTHER ORDERED, ADJUDGED AND DECREED That said sum of \$3,250.00, so hereinbefore found to be due to The Northern Trust Company, as Trustee, for additional compensation for its services as such Trustee for the period from December 2, 1931 to June 2, 1938, together with its Attorney's fees in the amount of \$8500 for the services of its counsel from December 2, 1931, to the date of entry of this decree, together with its legal costs and expenses to the date of entry of this decree, amounting to the total sum of \$11,792.49, be charged by said Trustee in its said account to be rendered to said several defendants, one-seventh to each of said defendants, Kate C. Gartz, Frances C. Lillie, Mary C. Russell, Emily C. Chadbourne, and Herbert P. Crane; one-seventh thereof to be charged to said distributees to the extent of the value of the assets of the estate of Richard T. Crane, Jr. received by them, respectively, and one-seventh thereof to defendant, Charles R. Crane.

"7. IT IS FURTHER ORDERED, ADJUDGED AND DECREED, and the Court hereby ORDERS, ADJUDGES AND DECREES, That said plaintiffs have judgment as at law against defendant, Herbert P. Crane, for the sum

Trunk and to The Northern Trust Company, as Trustee, for or on

account of such deficits to the extent of five-sevenths thereof,

determined as hereinafter provided, and that, to the extent of the

value of the assets of the estate of Richard T. Crane, Jr. received

by them, respectively, the said distributees pay to Emily M. Trunk,

or to The Northern Trust Company as Trustee, in exoneration of the

liability of Charles R. Crane therefor, six-sevenths of said deficit

of \$23,827.01, or so much thereof as is not paid by defendants Kate

G. Gatz and Herbert F. Crane, or either of them, (Frances C. Millie,

Mary C. Russell, and Emily C. Chubbourn having heretofore paid their

respective portions of said deficit), and that, to the extent of the

value of the assets of the estate of Richard T. Crane, Jr. received

by them, respectively, said distributees further pay to the extent

of six-sevenths thereof any and all future deficits. The foregoing

language in Par. 5, shall not be construed to constitute a money

judgment against said G. Gatz.

6. IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that said

sum of \$12,000, as hereinafter found to be due to the Northern

Trust Company, as Trustee, for additional compensation for its services

as such Trustee for the period from December 2, 1931 to June 2, 1932,

together with its Attorney's fees in the amount of \$3200 for the ser-

vices of its counsel from December 2, 1931, to the date of entry of

this decree, together with its legal costs and expenses to the date

of entry of this decree, amounting to the total sum of \$11,722.40,

be charged by said Trustee in its said account to be rendered to said

several defendants, one-seventh to each of said defendants, Kate C.

Gatz, Frances C. Millie, Mary C. Russell, Emily C. Chubbourn, and

Herbert F. Crane; one-seventh thereof to be charged to said distributees

to the extent of the value of the assets of the estate of Richard T.

Crane, Jr. received by them, respectively, and one-seventh thereof

to defendant, Charles R. Crane.

7. IT IS FURTHER ORDERED, ADJUDGED AND DECREED, and the

Court hereby orders, ADJUDGES AND DECREES, that said distributees pay

judgment as at law against defendant, Herbert F. Crane, for the sum

of \$27,752.84, together with interest on \$26,063.20 thereof from December 2, 1937 to date of payment, and that plaintiffs have execution therefor.

"8. IT IS FURTHER ORDERED, ADJUDGED AND DECREED That unless the respective shares of any existing deficit, computed as hereinbefore stated, of said defendants, or any of them, as of December 2nd, in the year 1937, or any year thereafter, or upon the death of Emily M. Junkin, be paid to or received by said Trustee out of dividends or interest, within sixty days after written notice, from said Trustee of the amount of such deficit, said Trustee, or any party in interest under this decree, be and hereby is authorized to apply to this court for further instructions and directions with respect to the enforcement of the findings of the court herein with respect to the control of said trust funds for the purpose of satisfying the obligations of said defendants, or any of them, with respect to such deficits.

"9. IT IS FURTHER ORDERED, ADJUDGED AND DECREED That this Court retain jurisdiction of all the parties to this cause of which it now has jurisdiction, as aforesaid, and of the status of all the parties to and the subject matter of this cause, for the purpose of providing further, if necessary, for the execution of this decree and the enforcement of the respective liabilities of the parties hereto and of determining the amount of future deficits, if any, and for the purpose of further directing or providing for the payment thereof by the respective parties hereto and their respective heirs, executors, administrators, legal representatives, successors or assigns, who are hereby or may hereafter be found liable therefor.

"10. Any application made under the provisions of paragraphs 8 and 9 above may be made by summary petition of the party making such application upon such notice to the remaining parties hereto as the court may from time to time direct.

"11. That The Northern Trust Company be authorized to apply to this Court from time to time hereafter for instruction and advice in the performance of its duties as such Trustee and that any of the

of \$17,752.84, together with interest on \$20,000.00 thereon from December 2, 1937 to date of payment, and that plaintiffs have

"8. IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT

unless the respective shares of any existing deficit, computed as

hereinafter stated, of said defendants, or any of them, as of

December 2nd, in the year 1937, or any year thereafter, or upon the

death of Emily M. Turkin, be paid to or received by said trustee

out of dividends or interest, within sixty days after written notice

from said trustee of the amount of such deficit, said trustee, or

any party in interest under this decree, be and hereby is authorized

to apply to this court for further instructions and directions with

respect to the enforcement of the findings of the court herein with

respect to the control of said trust funds for the purpose of satisfy-

ing the obligations of said defendants, or any of them, with respect

to such deficit.

"9. IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT this

Court retain jurisdiction of all the parties to this cause of which

it now has jurisdiction, as aforesaid, and of the status of all the

parties to and the subject matter of this cause, for the purpose of

providing further, if necessary, for the execution of this decree

and the enforcement of the respective liabilities of the parties hereto

and of determining the amount of future deficits, if any, and for the

purpose of further directing or providing for the payment thereof by

the respective parties hereto and their respective heirs, executors,

administrators, legal representatives, successors or assigns, who are

hereby or may hereafter be found liable therefor.

"10. Any application made under the provisions of para-

graphs 8 and 9 above may be made by summary petition of the party

making such application upon such notice to the remaining parties

as the court may from time to time direct.

"11. That The Northern Trust Company be authorized to apply

to this court from time to time hereafter for instruction and advice in

the performance of its duties as such trustee and that any of the

parties to this cause be likewise authorized to apply to this Court from time to time for instruction and advice as to their respective rights, liabilities or duties by reason of any of the matters herein mentioned or referred to, not herein and hereby adjudicated and determined; and the Court expressly reserves for future determination the question of the rights of said Executors of the Will of Richard T. Crane, Jr. and defendant, Herbert P. Crane, respectively, with respect to the disposition of said 1,000 shares of the common stock of Crane Company bequeathed by Richard T. Crane, Jr. to Herbert P. Crane, and by said Executors withheld from distribution in accordance with the Order of the Probate Court of said Cook County, in the Matter of the Estate of Richard T. Crane, Jr., with leave to either of said parties to apply to this Court for further order with respect thereto."

The following is plaintiffs' theory of the case: "As to the distributees of the Estate of Richard T. Crane, Jr., and Charles R. Crane, plaintiffs' theory of the case was that while they remained severally liable, each for one-half of the deficits in Mrs. Junkin's income, The Northern Trust Company as trustee had the right to collect from the various members of the family the amount of the various deficits in Emily M. Junkin's income for which they had respectively assumed liability under the family settlement agreement in the complaint and above referred to; that not only had Richard T. Crane, Jr., and Charles R. Crane assumed a personal liability to Emily M. Junkin for the amount of said deficits, but that under the so-called family settlement agreement, and related documents, the four sisters and brother of Richard T. Crane, Jr., and Charles R. Crane had assumed a personal liability for their respective one-seventh shares of such deficits, and that both Emily M. Junkin, and The Northern Trust Company, as trustee, had the right, as third party beneficiary under said agreement, to enforce the liability of said four sisters and brother which they had thus assumed in their contracts with each other, and with their brothers Richard T. Crane, Jr., and Charles R. Crane. Plaintiffs further claimed that the

parties to this cause be likewise authorized to apply to this Court from time to time for instruction and advice as to their respective rights, liabilities or duties by reason of any of the matters herein

mentioned or referred to, not herein and hereby adjudged and determined; and the Court expressly reserves for future determination

the question of the rights of said executors of the Will of Richard T. Crane, Jr. and defendant, Richard T. Crane, Jr., respectively, with

respect to the disposition of said \$1,000 shares of the common stock of Crane Company bequeathed by Richard T. Crane, Jr. to Richard T.

Crane, and by said executors withheld from distribution in accordance with the Order of the Probate Court of said State County, in the

estate of said Estate of Richard T. Crane, Jr., and leave to either of said parties to apply to this Court for further order with

respect thereto."

The following is plaintiff's theory of the case: That the

the distributees of the Estate of Richard T. Crane, Jr., and Charles

R. Crane, plaintiff's theory of the case was that while they re-

ceived severally liable, each for one-half of the deficits in the

Junkin's income, The Northern Trust Company as trustee had the right

to collect from the various members of the family the amount of the

various deficits in Emily R. Junkin's income for which they had

respectively assumed liability under the family settlement agreement

in the complaint and above referred to; that not only had Richard

T. Crane, Jr., and Charles R. Crane assumed a personal liability to

Emily R. Junkin for the amount of said deficits, but that under the

so-called family settlement agreement, and related documents, the

four sisters and brother of Richard T. Crane, Jr., and Charles R.

Crane had assumed a personal liability for their respective one-

seventh shares of each deficit, and that both Emily R. Junkin,

and The Northern Trust Company, as trustee, had the right, as such

party beneficially under said agreement, to enforce the liability of

said four sisters and brother which they had thus assumed in their

contract with each other, and also their respective shares of said

reduction in Emily M. Junkin's guaranteed income from \$100,000 to \$85,000 insured solely to the benefit of Richard T. Crane, Jr., and Charles R. Crane and that the liabilities of the four sisters and brother should therefore be determined upon the basis of a guaranteed income to Emily M. Junkin of \$100,000, and not upon the basis of a guaranteed income of \$85,000 upon the basis of which the liability of Richard T. Crane, Jr., and Charles R. Crane was to be determined. Plaintiffs further claimed that A. F. Gartz, Jr., as assignee of Kate C. Gartz, was obligated for Kate C. Gartz' share of the deficits."

The following is the counterclaimants' theory of the case: "The counterclaimants, Charles R. Crane and the distributees of the estate of Richard T. Crane, Jr., deceased, claimed that while Charles R. Crane and Richard T. Crane, Jr., had assumed a personal liability to Emily M. Junkin for any deficit in the amount of her guaranteed income - each for one-half thereof - nevertheless under and by virtue of the family settlement agreement and related documents Richard T. Crane, Jr. (and to the extent of the value of the assets of his estate received by them, the distributees of his estate) were obligated, as between Richard T. Crane, Jr., and Charles R. Crane, for six-sevenths of the entire amount of such deficits, and also that as between Charles R. Crane and Richard T. Crane, Jr. (and the distributees of his estate) on the one hand, and their four sisters and brother on the other hand, said four sisters and brother had assumed five-sevenths of the liability for such deficits (each severally to the extent of one-seventh thereof). Counterclaimants further claimed that therefore, as between them on the one hand and their four sisters and brother on the other hand, the primary liability for five-sevenths of the liability for said deficits rested upon the four sisters and brother (severally to the extent of one-seventh each), and that they had the right to compel the said four sisters and brother to perform their respective obligations to Emily M. Junkin in exoneration of the liability which Charles R. Crane and Richard T. Crane, Jr., had initially assumed to the said Emily M. Junkin. Both plaintiffs and counterclaimants

reduction in Emily N. Tunkin's guaranteed income from \$100,000 to \$85,000 turned solely to the benefit of Richard T. Crane, Jr., and Charles N. Crane and that the liabilities of the four sisters and brother should therefore be determined upon the basis of a guaranteed income to Emily N. Tunkin of \$100,000, and not upon the basis of a guaranteed income of \$85,000 upon the basis of which the liability of Richard T. Crane, Jr., and Charles N. Crane was to be determined. Plaintiffs further claimed that A. F. Gertz, Jr., as trustee of Kate C. Gertz, was obligated for Kate C. Gertz' share of the deficits. The following is the counterclaimants' theory of the case: "The counterclaimants, Charles N. Crane and the distributees of the estate of Richard T. Crane, Jr., deceased, claimed that while Charles N. Crane and Richard T. Crane, Jr., had assumed a personal liability to Emily N. Tunkin for any deficit in the amount of her guaranteed income - each for one-half thereof - counterclaimants under an agreement of the family settlement agreement and related documents Richard T. Crane, Jr. (and to the extent of the value of the assets of his estate received by them, the distributees of his estate) were obligated, as between Richard T. Crane, Jr., and Charles N. Crane, for six-sevenths of the entire amount of such deficits, and also that as between Charles N. Crane and Richard T. Crane, Jr. (and the distributees of his estate) on the one hand, and their four sisters and brother on the other hand, with four sisters and brother had assumed five-sevenths of the liability for each deficit (each severally to the extent of one-seventh thereof). Counterclaimants further claimed that therefore, as between them on the one hand and their four sisters and brother on the other hand, the primary liability for five-sevenths of the liability for said deficits rested upon the four sisters and brother (severally to the extent of one-seventh each), and that they had the right to compel the said four sisters and brother to perform their respective obligations to Emily N. Tunkin in exoneration of the liability which Charles N. Crane and Richard T. Crane, Jr., had initially assumed to the said Emily N. Tunkin. Both plaintiffs and counterclaimants

[italics ours] claimed that it was not necessary in order that the liability of the four sisters and brother be enforced that the deficits be first paid to Emily H. Junkin either by Charles R. Crane or by the distributees of the estate of Richard T. Crane, Jr., deceased; that all of the parties in interest having been brought before the court in this action the court had full jurisdiction to determine and adjudicate their respective obligations herein. Both plaintiffs and counterclaimants [italics ours] claimed that the reduction in the guaranteed income of Emily H. Junkin from \$100,000 to \$85,000 inured solely to the benefit of Charles R. Crane and Richard T. Crane, Jr., and his distributees (to the extent of one-half each) and that the respective liabilities of the four sisters and brother should be enforced upon the basis of a guaranteed income of the full sum of \$100,000. Both plaintiffs and cross complainants [italics ours] also claimed that the jurisdiction of the Probate Court of Cook County in which the administration of the estate of Richard T. Crane, Jr., was pending at the time of the filing of the complaint, was inadequate for the determination and adjustment of the rights and interests of the several parties to this action, and that, therefore, it became and was necessary to invoke the jurisdiction of a court of equity for that purpose."

The appellants state their defense as follows:

"(1) No personal obligation is imposed upon any members of the Crane family, other than Charles R. Crane and Richard T. Crane, Jr., to pay any deficits occurring in the annuity funds for Emily H. Junkin under either

"(a) the agreement of June 2, 1912 * * *;

"(b) the agreement of June 11, 1914 * * *;

"(c) the addendum to said agreement of June 11, 1914, or Exhibit 'E' referred to in said agreement; or

"(d) the agreement of June 2, 1922, * * * by which the annuity for Emily H. Junkin was reduced to \$85,000;

"(2) that, by the execution of the addendum * * * the

[littles own] claimed that it was not necessary in order that the liability of the four sisters and brother be enforced that the deficits be first paid to Emily N. Jordan either by Charles R. Crane or by the distributees of the estate of Richard T. Crane, Jr., deceased; that all of the parties in interest having been brought before the court in this action the court had full jurisdiction to determine and adjudge their respective obligations herein. Both plaintiffs and respondents [littles own] claimed that the reduction in the guaranteed income of Emily N. Jordan from \$100,000 to \$87,000 inured solely to the benefit of Charles R. Crane and Richard T. Crane, Jr., and his distributees (to the extent of one-half each) and that the respective liabilities of the four sisters and brother should be enforced upon the basis of a guaranteed

income of the full sum of \$100,000. Both plaintiffs and respondents [littles own] also claimed that the jurisdiction of the Probate Court of Cook County in which the administration of the estate of Richard T. Crane, Jr., was pending at the time of the filing of the complaint, was inadequate for the determination and adjustment of the rights and interests of the several parties to this action, and that, therefore, it became and was necessary to invoke the jurisdiction of a court of equity for that purpose.

The respondents state their defense as follows:

"(1) No personal obligation is imposed upon any members of the Crane family, other than Charles R. Crane and Richard T. Crane, Jr., to pay any deficits occurring in the annuity funds for

Emily N. Jordan under either

"(a) the agreement of June 2, 1912 * * *;

"(b) the agreement of June 11, 1914 * * *;

"(c) the addendum to said agreement of June 11, 1914, or

Exhibit 'B' referred to in said agreement; or

"(d) the agreement of June 2, 1922, * * * by which the

annuity for Emily N. Jordan was reduced to \$87,000;

"(2) that, by the execution of the addendum * * * the

other members of the Crane family did not assume or become bound by the terms of said agreement of June 11, 1914, except for the limited purposes specifically set forth in said addendum and Exhibit 'E'; the limited purposes specified in said addendum, which are germane to the issues, being as follows:

"(a) Being stockholders of the Crane Company, they agree to be bound by the terms and conditions of the agreement of June 11, 1914, so far as said agreement affected the Crane Company or themselves, as stockholders;

"(b) that they, in compliance with the terms of Article XI of said agreement of June 11, 1914, will execute and perform the agreement contained in Exhibit 'E';

"(3) that the sole obligations, which are germane to the issues here involved, imposed upon the other members of the Crane family under the provisions of Exhibit 'E', are to cause to be transferred and delivered to The Northern Trust Company, as Trustee, 1,000 shares of stock of the Crane Company, to be held by said Trustee during the lifetime of Emily H. Junkin, subject to the following provisions:

"(a) From the dividends thereon and the income from other securities, the annuity payments provided for Emily H. Crane under the terms of the agreement of December 2, 1912, were to be made;

"(b) One-seventh of the sum necessary to make the said annuity payments to be taken from the dividends received from each 1,000 shares of the stock transferred and delivered to the Trustee;

"(c) To pay over any excess dividends not required for said purposes to the person who deposited said 1,000 shares of stock;

"(d) The Trustee, upon the death of Emily H. Junkin, to retransfer and redeliver the said 1,000 shares of stock to the person so depositing them;

other members of the Crane family did not assume or become bound by the terms of said agreement of June 11, 1914, except for the limited purposes specifically set forth in said addendum and Exhibit 'E'; the limited purposes specified in said addendum, which are herein to the issues, being as follows:

"(a) Being stockholders of the Crane Company, they agree to be bound by the terms and conditions of the agreement of June 11, 1914, so far as said agreement affected the Crane Company of America, as amended;

"(b) That they, in compliance with the terms of Article XI of said agreement of June 11, 1914, will execute and perform the agreement contained in Exhibit 'E';

"(c) That the said obligations, which are herein to the issues here involved, imposed upon the other members of the Crane family under the provisions of Exhibit 'E', are to agree to be transferred and delivered to The Northern Trust Company, as Trustee, 1,000 shares of stock of the Crane Company, to be held by said Trustee during the lifetime of Emily M. Jamieson, subject to the following provisions:

"(a) From the dividends thereon and the income from other investments, the annuity payments provided for Emily M. Crane under the terms of the agreement of December 8, 1912, were to be made;

"(b) One-seventh of the sum necessary to make the said annuity payments to be taken from the dividends received from each 1,000 shares of the stock transferred and delivered to the Trustee;

"(c) To pay over any excess dividends not required for said purposes to the person who deposited said 1,000 shares of stock;

"(d) The Trustee, upon the death of Emily M. Jamieson, to retransfer and redeliver the said 1,000 shares of stock to the person so depositing them;

"(4) that the following provision of the agreement of June 11, 1914, Article XI,

"* * * therefore the said Kate C. Gartz, Frances C. Lillie, Mary C. Russell, Emily C. Chadbourne and Herbert P. Crane do severally agree to pay, on demand, one-seventh of all money which may be due and payable under said agreement of December 2, 1912,'

is limited and controlled by a subsequent provision of said agreement (Article XI):

"Should the dividends and income received by said The Northern Trust Company, as Trustee, from the aforesaid 6,000 shares of stock and the \$173,000 face value of First Mortgage 5-1/2% Bonds * * * be insufficient to pay all moneys which are due and payable under said agreement of December 2, 1912, the brother and sisters [the other members of the Crane family] of the parties hereto [Charles R. Crane and Richard T. Crane, Jr.] severally agree that they will each pay to the "high bidder" [Richard T. Crane, Jr.], on demand, one-seventh of any sum which the "high bidder" may be compelled to pay to the said The Northern Trust Company, in order that he may fully perform the terms of said agreement of December 2, 1912.';

that said provisions were merely an expression of an intent on the part of Charles R. Crane and Richard T. Crane, Jr. that the other members of the Crane family should assent thereto, but that the other members of the Crane family did not assent thereto in the limited obligations which they assumed under the addendum and Exhibit 'E.' If, however, said provisions were imposed upon the other members of the Crane family by the addendum and Exhibit 'E,' it was a secondary liability upon them, conditioned upon the 'high bidder's' being first compelled to pay to The Northern Trust Company, as Trustee, any deficits occurring in the annuity; that, until the 'high bidder' was compelled to pay said deficits to the Trustee, the secondary liability of the other members of the Crane family did not arise;

"(4) that the following provision of the agreement of

the 12, 1912, Exhibit II,

"* * * therefore the said Kate C. Crane, Thomas C.

Grane, Mary C. Grane, Emily C. Grane, and Henry F.

Grane do severally agree to pay, on demand, one-seventh of

all money which may be due and payable under said agreement

of December 2, 1912,

is limited and controlled by a subsequent provision of said agreement

(Exhibit II);

"Should the dividends and income received by said the

Northern Trust Company, as Trustee, from the aforesaid \$1,000

shares of stock and the \$12,000 face value of first mortgage

5-1/2% bonds * * * be insufficient to pay all money which are

due and payable under said agreement of December 2, 1912, the

brother and sisters [the other members of the Grane family]

of the parties hereto [Charles R. Grane and Richard T. Grane,

it,] severally agree that they will each pay to the "high

bidder" [Richard T. Grane, Jr.], on demand, one-seventh of any

sum which the "high bidder" may be compelled to pay to the said

The Northern Trust Company, in order that he may fully perform

the terms of said agreement of December 2, 1912;

that said provisions were merely an expression of an intent on the part

of Charles R. Grane and Richard T. Grane, Jr. that the other members

of the Grane family should assent thereto, but that the other members

of the Grane family did not assent thereto in the limited obligations

which they assumed under the agreement and Exhibit 'B'; it, however,

said provisions were imposed upon the other members of the Grane

family by the agreement and Exhibit 'B'; it was a secondary liability

upon them, conditioned upon the 'high bidder's' being first compelled

to pay to The Northern Trust Company, as Trustee, any deficits

occurring in the family; but, until the 'high bidder' was compelled

to pay said deficits to the Trustee, the secondary liability of the

other members of the Grane family did not arise;

"(5) that the 'high bidder' alone, after being compelled to pay said deficit to the Trustee - if there be a secondary liability - could bring a cause of action against the other members of the Crane family, but, since the pleadings contain no allegation and the record is silent as to whether or not the 'high bidder' has made any deficit payments into the annuity fund, the prerequisite for his bringing a cause of action against the other members of the Crane family does not exist; and, under no circumstances, could the Trustee, Emily H. Junkin, or Charles R. Crane and Richard T. Crane, Jr., jointly, bring a cause of action against the other members of the Crane family, as to the annuity deficits;

"(6) that if a secondary liability is imposed, the limit of the other members of the Crane family is one-seventh of any sum which the 'high bidder' may be compelled to pay on account of the annuity deficits; that, under the provisions of the last paragraph of Article XI of the agreement of June 11, 1914, the maximum personal liability of the 'high bidder' (Richard T. Crane, Jr.) was to pay six-sevenths of any deficit occurring in the annuity fund, and that the secondary liability, if any, of the other members of the Crane family to the 'high bidder' was limited each to a one-seventh of six-sevenths of such annuity deficits; that, since the agreement between Charles R. Crane, Richard T. Crane, Jr. and Emily H. Junkin, dated June 2, 1922, reduced the annuity from \$100,000 to \$85,000, the personal liability of the 'high bidder' from June 2, 1922, was six-sevenths of any deficits which might arise, on the basis of an \$85,000 annuity; and that from June 2, 1922, if any secondary liability is imposed upon the other members of the Crane family, it is limited to a one-seventh each of six-sevenths of any deficit arising in the \$85,000 annuity fund, conditioned upon the 'high bidder's' first being compelled to pay such deficit to the Trustee, for the reason that the agreement of June 2, 1922, specifically reduced the obligation of the 'high bidder' under the terms of the agreement of December 2, 1912, to contribute to any annuity deficits

"(5) that the 'high bidder', alone, after being compelled to pay said deficit to the Trustee - it there be a secondary liability - could bring a cause of action against the other members of the Crane family, but, since the pleadings contain no allegation and the record is silent as to whether or not the 'high bidder' has made any deficit payments into the annuity fund, the propriety for his bringing a cause of action against the other members of the Crane family does not exist; and, under no circumstances, could the Trustee, Emily N. Jamison, or Charles A. Crane and Richard T. Crane, Jr., jointly, bring a cause of action against the other members of the Crane family, as to the annuity deficits;

"(6) that if a secondary liability is imposed, the limit of the other members of the Crane family as one-seventh of any sum which the 'high bidder' may be compelled to pay on account of the annuity deficits; that, under the provisions of the last paragraph of Article XI of the agreement of June 2, 1922, the maximum personal liability of the 'high bidder' (Richard T. Crane, Jr.) was to pay six-sevenths of any deficit occurring in the annuity fund, and that the secondary liability, if any, of the other members of the Crane family to the 'high bidder', was limited each to a one-seventh of six-sevenths of such annuity deficits; that, since the agreement between Charles A. Crane, Richard T. Crane, Jr. and Emily N. Jamison, dated June 2, 1922, reduced the annuity from \$100,000 to \$85,000, the personal liability of the 'high bidder' from June 2, 1922, was six-sevenths of any deficits which might arise, on the basis of an \$85,000 annuity; and that from June 2, 1922, if any secondary liability is imposed upon the other members of the Crane family, it is limited to a one-seventh each of six-sevenths of any deficit arising in the \$85,000 annuity fund, conditioned upon the 'high bidder's' first being compelled to pay such deficit to the Trustee, for the reason that the agreement of June 2, 1922, specifically reduced the obligation of the 'high bidder' under the terms of the agreement of December 2, 1912, to contribute to any annuity deficits

arising on an \$85,000 annuity rather than on a \$100,000 annuity."

The agreement of June 11, 1914, between Charles R. Crane and Richard T. Crane, Jr., with the "consent" or "addendum" thereto signed by all the other members of the Crane family constitutes, in our judgment, a family settlement agreement. By the will of Richard T. Crane, Sr., certain provisions were made for his widow, in addition to the provisions made for her by the ante-nuptial agreement. It is a reasonable inference, from the record, that the provisions made in the will were not satisfactory to her, and Charles R. Crane and Richard T. Crane, Jr., who were made the residuary legatees of their father's estate, entered into the contract with her of December 2, 1912, by the terms of which the widow received substantially more than the ante-nuptial agreement and her husband's will provided for her, in consideration of which she accepted the provisions of the will in her behalf and ratified the marriage settlement agreement. As appears from the agreement of June 11, 1914, differences arose between Charles R. Crane and Richard T. Crane, Jr., "as to the true interpretation of the provisions of said Will, and as to the future conduct of the affairs of the Crane Company," and of the Crane Valve Company, which differences had been, and if not adjusted would continue to be, detrimental to the conduct of the business, "and prejudicial to the interests of all stockholders therein," and it was believed that the best interests of both said corporations and of the stockholders therein required that either Charles R. or Richard T., Jr., should dispose of his interest in the stock of both said corporations. The other members of the family were substantial stockholders of the Crane Company and Charles R. and Richard T., Jr., considered that their consent was necessary for the consummation of the plan which they, Charles R. and Richard T., Jr., had agreed upon for the purchase by the Company of the interest of one or the other of them. It also seems clear that the other members of the family concluded that, in view of the situation, they were in

of the family concluded that, in view of the situation, they were in one or the other of them. It also seems clear that the other members had agreed upon for the purchase by the Company of the interest of summation of the plan which they, Charles R. and Richard T., Jr., T., Jr., considered that their consent was necessary for the continuation of the Company and Charles R. and Richard T., Jr. and Richard T., Jr., should dispose of his interest in the stock of and of the stockholders therein required that either Charles R. or it was believed that the best interests of both said corporations judicial to the interests of all stockholders therein," and times to be, detrimental to the conduct of the business, and no Company, which differences had been, and if not adjusted would conduct of the affairs of the Crane Company," and of the Crane Valve interpretation of the provisions of said will, and as to the future Charles R. Crane and Richard T. Crane, Jr., "as to the true the agreement of June 11, 1914, differences arose between ratified the marriage settlement agreement. As appears from she accepted the provisions of the will in her behalf and and her husband's will provided for her, in consideration of which widow received substantially more than the ante-nuptial agreement tract with her of December 2, 1912, by the terms of which the residuary legacies of their father's estate, entered into the con- Charles R. Crane and Richard T. Crane, Jr., who were made the the provisions made in the will were not satisfactory to her, and agreement. It is a reasonable inference, from the record, that in addition to the provisions made for her by the ante-nuptial Richard T. Crane, Jr., certain provisions were made for his widow, in our judgment, a family settlement agreement. By the will of signed by all the other members of the Crane family constituted and Richard T. Crane, Jr., with the "consent" or "adhesion" thereto The agreement of June 11, 1914, between Charles R. Crane arising on an \$87,000 annuity rather than on a \$100,000 annuity."

a position to demand of Charles R. and Richard T., Jr., a share of the father's estate, which by the terms of his will was given to Charles R. and Richard T., Jr. It also seems clear that the latter were willing to grant the demand, provided that their brother and sisters would share the burden of the agreement of December 2, 1912, wherein Charles R. and Richard T., Jr., had guaranteed to the stepmother a net income of \$100,000 per year so long as she should live. In the agreement of June 11, 1914, Charles R. and Richard T., Jr., after stating that differences had arisen between them as to the true interpretation of the provisions of their father's will and as to the future conduct of the affairs of the Crane Company, recite: "Whereas, the parties hereto desire that a part of the property which comprised the estate of Richard T. Crane, Senior, shall be set aside to create certain charitable funds, and further desire that the sisters and brother of the parties hereto shall each receive some of the stock of the Crane Company formerly owned by Richard T. Crane, Senior, notwithstanding the fact that none of said stock was devised to said sisters and brother * * *." The agreement next refers to the contract of December 2, 1912, and recites: "Whereas, all children of said Richard T. Crane, deceased, desire that the burdens of said agreement of December 2, 1912, should be borne by all children of Richard T. Crane, deceased, who receive any share in his estate, and by their heirs and personal representatives * * *." Article II provides: "Within Thirty days after the terms and form of the bonds and mortgage or trust deed hereinafter provided for shall have been agreed upon, and Herbert P. Crane, Kate C. Gartz, Mary C. Russell, Frances C. Lillie and Emily C. Chadbourne (who together with the parties hereto are the sole surviving children of Richard T. Crane, deceased) shall have executed their several consents to the terms of this contract, in the form hereto attached, each of the parties hereto shall," etc. Article XVII provides: "This agreement, when carried into effect, shall operate as a complete settlement of all the aforesaid differences between the parties hereto, and as a

a position to demand of Charles E. and Richard E. Jr. a share
of the father's estate, which by the terms of his will was given
to Charles E. and Richard E. Jr. It is also shown clear that the
latter were willing to grant the demand, provided that their brother
and sisters would share the burden of the payment of December 2,
1912, wherein Charles E. and Richard E. Jr. had guaranteed to
the stepparent a net income of \$100,000 per year so long as she should
live. In the agreement of June 11, 1912, Charles E. and Richard E.
Jr., after stating that differences had arisen between them as to
the true interpretation of the provisions of their father's will and
as to the future conduct of the affairs of the Crane Company, recited:
"Whereas, the parties hereto desire that a part of the property which
comprised the estate of Richard E. Crane, Senior, shall be set aside
to provide certain charitable trusts, and further desire that the
sister and brother of the decedent herein shall and should share
the share of the same income, and should be treated as such;
Therefore, notwithstanding the fact that some of said trusts and funds
to said sister and brother * * *. The agreement and recited in
the contract of December 2, 1912, and recited: "Whereas, all child-
ren of said Richard E. Crane, deceased, desire that the income of
said agreement of December 2, 1912, should be borne by all children
of Richard E. Crane, deceased, who receive any share in his estate,
and by their heirs and personal representatives * * *." Article II
provided: "Said trusts and funds shall be set aside and paid to the sister
and mortgage or trust deed hereinafter provided for shall have been
agreed upon, and Herbert P. Crane, Kate E. Crane, Mary E. Thessell,
Frances M. Little and Earl E. Thompson (the latter with the
parties hereto are the sole surviving children of Richard E. Crane,
deceased) shall have executed their several consents to the terms
of this contract, in the form hereto attached, each of the parties
hereto shall, over and above the said agreement, shall
be carried into effect, shall operate as a complete settlement of all
the claims and differences between the parties hereto, and as a

release by each of all claims which he may have against the other, and shall also operate as a release and discharge by each of the persons who signs the consent attached hereto of all claims which he or she may have, or may have asserted against the parties hereto, or either one of them, in any manner whatsoever, arising because or out of the Estate of said testator, or out of any agreements or negotiations heretofore had as to the distribution of the estate of said testator, or as to the setting apart by the parties hereto of shares of stock of the Crane Company to the several parties signing such consent; and shall also operate as a full release and discharge to the Crane Company of any claims and demands which either of the parties hereto, or any of the persons signing said consent, may have, or may at any time have asserted, growing, or arising out of the failure of any of said parties to secure the right at any time in the past to subscribe for, purchase or receive, any stock of the Crane Company; and the parties who have executed the consent attached hereto severally agree that they accept the stock allotted to them in Article X hereof in full satisfaction of any claim, legal, equitable or moral, which they have up to the date hereof to stock of the Crane Company, and each of said parties agrees that he or she will, upon the execution of this agreement, execute and deliver to the Crane Company a release which shall be in the form as set out in Exhibit H which is attached hereto."

Article I provides that the executors of the estate of Richard T. Crane, Sr., shall immediately transfer and deliver to The Northern Trust Company, as trustee under the agreement of December 2, 1912, 2,500 shares of "Estate Stock," to be held by said trustee in lieu of the 2,500 shares of Crane stock previously transferred to it by Charles R. Crane. The article also sets forth the amount of Crane Company stock which will be held as "Estate Stock" when the transfers therein specified shall have been made, amounting to 55,217 shares, and, in addition thereto, the 5,000 shares standing in the name of The Northern Trust Company as trustee under the contract of December 2, 1912. It appears from Article III of the agreement that

release by each of all claims which he may have against the other, and shall also operate as a release and discharge by each of the persons who signs the consent attached hereto of all claims which he or she may have, or may have asserted against the parties hereto, or either one of them, in any manner whatsoever, arising because or out of the Estate of said testator, or out of any agreements or negotiations heretofore had as to the distribution of the estate of said testator, or as to the setting apart by the parties hereto of shares of stock of the Crane Company to the several parties signing such consent; and shall also operate as a full release and discharge to the Crane Company of any claims and demands which either of the parties hereto, or any of the persons signing said consent, may have, or may at any time have asserted, growing, or arising out of the failure of any of said parties to secure the right at any time in the past to subscribe for, purchase or receive, any stock of the Crane Company; and the parties who have executed the consent attached hereto severally agree that they accept the stock allotted to them in Article X hereto in full satisfaction of any claim, legal, equitable or moral, which they have up to the date hereto to stock of the Crane Company, and each of said parties agrees that he or she will, upon the execution of this agreement, execute and deliver to the Crane Company a release which shall be in the form as set out in Exhibit K which is attached hereto."

Article I provides that the executors of the estate of Richard T. Crane, Sr., shall immediately transfer and deliver to The Northern Trust Company, as trustee under the agreement of December 2, 1912, 2,700 shares of "Estate Stock," to be held by said trustee in lieu of the 2,700 shares of Crane stock previously transferred to it by Charles R. Crane. The article also sets forth the amount of Crane Company stock which will be held as "Estate Stock" when the transfers therein specified shall have been made, amounting to 27,217 shares, and, in addition thereto, the 2,000 shares standing in the name of The Northern Trust Company as trustee under the consent of December 2, 1912. It appears from Article III of the agreement that

there was a credit of \$741,030.57 on account of an unpaid dividend of eighteen per cent on "Estate Stock" standing on the books of the Crane Company to the credit of the estate of Richard T. Crane, deceased, and the said article provides for the distribution/ ^{of the same.} Article X provides that the "Estate Stock" which shall remain after all of the transfers thereof therein provided for, for charitable and other purposes therein described, "shall be divided into five equal portions for the equal benefit of the four sisters and one brother of the parties hereto, and said portions shall be transferred and delivered in the manner provided in Article XI hereof." (Italics ours.) In Article XI appears the following: "* * * inasmuch as said agreement was made for the protection and benefit of the Estate of Richard T. Crane, deceased, and Kate C. Gartz, Frances C. Lillie, Mary C. Russell, Emily C. Chadbourne and Herbert P. Crane, the sisters and brother of the parties hereto are now about to receive considerable portions of that estate, therefore, the said Kate C. Gartz, Frances C. Lillie, Mary C. Russell, Emily C. Chadbourne and Herbert P. Crane do severally agree to pay on demand one-seventh of all money which may be due and payable under said agreement of December 2, 1912." (Italics ours.) Article XII provides: "For Five years after the date when the Crane Company purchases the interest of 'the seller' as hereinabove provided, all stock of the Crane Company which is owned, or the voting power of which is controlled, by the parties hereto, or by the persons signing the consent attached to this contract, shall be voted at all elections of directors of the Crane Company in favor of such persons for directors of said company as shall be named by the 'high bidder,' provided that he shall so long survive and remain the holder of a majority of the total stock of said Crane Company which may from time to time be issued and outstanding." Article XIX provides: "Each of the several agreements herein contained is dependent upon each of the others, and is to be binding only in case this entire agreement is carried out." (Italics ours.) Immediately following the signatures of Charles R. Crane and Richard T. Crane, Jr.,

[illegible]

to the agreement appears the following:

"In consideration of the benefits which will be received by us under the terms of the foregoing agreement between Charles R. Crane and Richard T. Crane, Junior, dated June eleventh, 1914, and of the provisions contained in said agreement affecting us, we, the undersigned, being children of Richard T. Crane, deceased, and stockholders in the Crane Company, do severally hereby agree, each with the other, and with the said Charles R. Crane and Richard T. Crane, Junior, to all the terms and conditions of said agreement, so far as the same affect the Crane Company, or ourselves; and we do further severally agree that the Crane Company may purchase the stock of 'the seller' and may purchase the assets and business of the Crane Valve Company in the manner, for the price, and upon the terms, and may pay for the same in the manner, in said agreement set forth; and that the Board of Directors of the Crane Company shall be selected, and by-laws adopted, as provided in said agreement; and that as stockholders of said Crane Company, we will vote all stock owned and controlled by us in such way as to give effect to all the terms and conditions of said agreement and will specifically perform the terms of Article XII of said agreement, and we severally agree that we will each of us, in compliance with the terms of Article XI of said agreement, execute and perform the agreement of which Exhibit E, which is hereto attached, is a copy; and the undersigned, Emily Crane Chadbourne, agrees that she will, in compliance with the provisions of Article XI of said agreement, execute and perform the agreement of which Exhibit F is a copy; and we all agree that we will, in compliance with the terms of Article XVII of said agreement, execute the instrument of which Exhibit H is a copy.

"This agreement shall be binding upon and enure to the benefit of the parties hereto, and their respective heirs, executors, administrators, personal representatives and assigns.

"IN WITNESS WHEREOF we have hereunto set our Hands and

to the agreement appears the following:

"In consideration of the benefits which will be received

by us under the terms of the foregoing agreement between Charles
R. Crane and Richard T. Crane, Junior, dated June eleventh, 1914,
and of the provisions contained in said agreement affecting us,
we, the undersigned, being children of Richard T. Crane, deceased,
and stockholders in the Crane Company, do severally hereby agree,
each with the other, and with the said Charles R. Crane and Richard
T. Crane, Junior, to all the terms and conditions of said agreement,
so far as the same affect the Crane Company, or ourselves; and we
do further severally agree that the Crane Company may purchase the
stock of 'the seller' and may purchase the assets and business of
the Crane Valve Company in the manner, for the price, and upon the
terms, and may pay for the same in the manner, in said agreement
set forth; and that the Board of Directors of the Crane Company
shall be selected, and by-laws adopted, as provided in said agree-
ment; and that as stockholders of said Crane Company, we will vote
all stock owned and controlled by us in such way as to give effect
to all the terms and conditions of said agreement and will specifi-
cally perform the terms of Article XII of said agreement, and we
severally agree that we will each of us, in compliance with the
terms of Article XI of said agreement, execute and perform the agree-
ment of which Exhibit B, which is hereto attached, is a copy; and
the undersigned, Emily Crane Chadbourne, agree that she will, in
compliance with the provisions of Article XI of said agreement,
execute and perform the agreement of which Exhibit T is a copy; and
we all agree that we will, in compliance with the terms of Article
XVII of said agreement, execute the instrument of which Exhibit E
is a copy.

"This agreement shall be binding upon all parties to it.

Witness of the parties hereto, and their respective heirs, executors,
administrators, personal representatives and assigns.

"IN WITNESS WHEREOF we have hereunto set our hands and

Seals this Eleventh day of June, A. D. 1914.

| | |
|-------------------------|-------------------------|
| "Kate C. Gartz | (Seal) |
| "Frances C. Lillie | (Seal) |
| "Mary C. Russell | (Seal) |
| "Emily Crane Chadbourne | (Seal) |
| "Herbert F. Crane | (Seal)" (Italics ours.) |

Upon the same date all of the parties executed the trust agreement referred to as Exhibit E, and the appellants contend that the "addendum" to the agreement of June 11, 1914, and Exhibit E control the obligations of the members of the Crane family other than Charles R. and Richard T., Jr. The agreement signed by Charles R. and Richard T., Jr., and the so-called "addendum" or "consent," in our judgment, are parts of one agreement, which has been called "the Family Settlement Agreement." As well stated by counsel for appellees: "* * * whereas it is perfectly apparent from the terms of said agreement, as above indicated, that it was one between all the members of the Crane family for the purpose not only of providing for the control and management of said Crane Company by the so-called 'high bidder' and of settling the differences between the two brothers with respect thereto, but also for the purpose of settling the differences between the two brothers and their other brother and sisters arising out of rights or claims, 'legal, equitable or moral,' which the latter had asserted with respect to the provisions of their father's Will, and with respect to some share of the 'Estate Stock' held by the estate of their said father, Richard T. Crane, Sr., as well as for the express purpose of carrying out the expressed desire of all the children of said Richard T. Crane, Sr., that the burdens of said Agreement of December 2, 1912, should be borne by all children of Richard T. Crane, deceased, who might receive any share of his estate. Said agreement expressly provided for the division of such part of the 'Estate Stock' as should remain after the transfer of certain portions thereof as in said agreement specified, into five equal parts for the equal benefit of the other members of the family in the manner provided in Article XI of said agreement, and, as above stated, that they accepted the stock so

Beats this eleventh day of June, A. D. 1914.

Witness my hand and seal of office at the City of New York, this 11th day of June, 1914.

Herbert W. Crane
"Family Crane Chamberlain"
"Mary E. Russell"
"Thomas G. Miller"
"John C. Gifford"
(Seal) (Seal) (Seal) (Seal) (Seal)

Upon the same date all of the parties executed the trust agreement referred to as Exhibit B, and the appellants contend that the "addendum" to the agreement of June 11, 1914, and Exhibit B control the obligations of the members of the Crane family other than Charles H. and Richard T., Jr. The agreement signed by Charles H. and Richard T., Jr., and the so-called "addendum" or "consent," in our judgment, are parts of one agreement, which has been called "the Family Settlement Agreement." As well stated by counsel for appellees: " * * * whereas it is perfectly apparent from the terms of said agreement, as above indicated, that it was one between all the members of the Crane family for the purpose not only of providing for the control and management of said Crane Company by the so-called 'high bidder' and of settling the differences between the two brothers with respect thereto, but also for the purpose of settling the differences between the two brothers and their other brother and sisters arising out of rights or claims, 'legal, equitable or moral,' which the latter had asserted with respect to the provisions of their father's will, and with respect to some share of the 'Estate Stock' held by the estate of their said father, Richard T. Crane, Sr., as well as for the express purpose of carrying out the expressed desire of all the parties of said Richard T. Crane, Sr., that the portions of said agreement of December 1, 1911, should be borne by all children of Richard T. Crane, deceased, who might receive any share of his estate. Said agreement expressly provided for the division of each part of the 'Estate Stock' as should remain after the transfer of certain portions thereof as in said agreement specified, into five equal parts for the equal benefit of the other members of the family in the manner provided in Article IV of said agreement, and, as above stated, that they accepted the stock so

allotted to them in full satisfaction of any claims which they (all of said children except said Charles R. Crane and Richard T. Crane, Jr.) might have or might have asserted, arising out of the failure of any of the last named parties to secure the right at any time in the past to subscribe for, purchase or receive any stock of the Crane Company. Furthermore, Article I of said Family Settlement Agreement expressly provides that the executors of the estate of Richard T. Crane, Sr., shall immediately transfer and deliver to The Northern Trust Company, as Trustee under said Agreement of December 2, 1912, 2,500 shares of 'Estate Stock,' to be held by said Trustee in lieu of the 2,500 shares of Crane stock previously transferred to it by Charles R. Crane; and sets forth the amount of Crane Company stock which will be held as 'Estate Stock' when the transfers thereof therein specified shall have been made, amounting to 55,217 shares, and, in addition thereto, the 5,000 shares standing in the name of The Northern Trust Company as Trustee under said contract of December 2, 1912. It also appears by Article III of said agreement that there was still a credit of \$741,030.57 on account of an unpaid dividend of 18% on 'Estate Stock' standing on the books of Crane Company to the credit of the estate of Richard T. Crane, deceased, the distribution of which is therein provided for." Exhibit E (Article I) provides that each of the members of the Crane family shall transfer and deliver to The Northern Trust Company, as Trustee, certain securities, which are to be held by the trustee during the life of Mrs. Junkin, subject to the following terms and conditions:

"Paragraph (a). Second parties and third party agree that from the dividends and income derived from said 6,000 shares of stock and \$195,000 face value of bonds there shall be made the payments provided for in Paragraph 2 of said agreement of December 2, 1912, and all other payments, if any, which Charles R. Crane and Richard T. Crane, Junior, covenanted in said agreement of December 2, 1912, to make, and that one-seventh of the sum necessary to make said payments shall be taken from the dividends received from each 1,000 shares of stock

allotted to them in full satisfaction of any claims which they (all of said children except said Charles R. Crane and Richard T. Crane, Jr.) might have or might have asserted, arising out of the failure of any of the last named parties to secure the right at any time in the past to subscribe for, purchase or receive any stock of the Crane Company. Furthermore, Article I of said Family Settlement Agreement expressly provides that the executors of the estate of Richard T. Crane, Jr., shall immediately transfer and deliver to The Northern Trust Company, as trustee under said agreement of December 2, 1912, 2,500 shares of 'Estate Stock' to be held by said Trustee in lieu of the 2,500 shares of Crane stock previously transferred to it by Charles R. Crane; and sets forth the amount of Crane Company stock which will be held as 'Estate Stock' when the transfers thereof therein specified shall have been made, amounting to 27,217 shares, and, in addition thereto, the 2,000 shares standing in the name of The Northern Trust Company as trustee under said contract of December 2, 1912. It also appears by Article III of said agreement that there was still a credit of \$741,030.77 on account of an unpaid dividend of 18¢ on 'Estate Stock' standing on the books of Crane Company to the credit of the estate of Richard T. Crane, deceased, the distribution of which is therein provided for. Subtitle B (Article I) provides that each of the members of the Crane family shall transfer and deliver to The Northern Trust Company, as Trustee, certain securities, which are to be held by the trustee during the life of Mrs. Tammie, subject to the following terms and conditions:

"Paragraph (a). Second parties and third party agree that from the dividends and income derived from said 6,000 shares of stock and \$197,000 face value of bonds there shall be made the payments provided for in Paragraph 2 of said agreement of December 2, 1912, and all other payments, if any, which Charles R. Crane and Richard T. Crane, Junior, covenanted in said agreement of December 2, 1912, to make, and that one-seventh of the sum necessary to make said payments shall be taken from the dividends received from each 1,000 shares of stock

transferred and delivered to said The Northern Trust Company, as above set out, and one-seventh of the sum necessary to make said payments shall be taken from the interest collected from the bonds transferred and delivered to the said The Northern Trust Company, as above set out.

"Paragraph (b). Said The Northern Trust Company shall keep separate accounts with each of second parties, and shall collect the dividends received from each 1,000 shares of stock transferred by each of second parties who shall have transferred stock hereunder, and shall pay from the dividends received from each 1,000 shares, one-seventh of all payments which shall be made in accordance with Paragraph 2 of said agreement of December 2, 1912, and one-seventh of all moneys which Charles R. Crane and Richard T. Crane, Junior, covenanted by said agreement of December 2, 1912, to pay, and said The Northern Trust Company shall pay the remainder of said dividends, if any there shall be, to the person who deposited said 1,000 shares of stock. In addition thereto said The Northern Trust Company shall collect all interest which may be paid on said \$195,000 face value of bonds, and shall pay therefrom one-seventh of all payments which shall be made in accordance with Paragraph 2 of said agreement of December 2, 1912, and one-seventh of all moneys which Charles R. Crane and Richard T. Crane, Junior, covenanted in said agreement of December 2, 1912, to pay. And said The Northern Trust Company shall pay the remainder of such interest, if any there shall be, to said Charles R. Crane.

"Paragraph (c). In the event that any of said second parties shall die prior to the death of Emily Hutchinson Junkin, said The Northern Trust Company shall pay to the executors, administrators and assigns of the person who shall so have died, all moneys which would have been paid to such person had he or she not died.

"Paragraph (d). Upon the death of the said Emily Hutchinson Junkin, said The Northern Trust Company, as Trustee, shall transfer and deliver to each of second parties, and in the event of the death of any of second parties then to their executors, administrators and assigns, the stock or bonds so transferred and delivered by them to the said

transferred and delivered to said The Northern Trust Company, as above set out, and one-seventh of the sum necessary to make said payments shall be taken from the interest collected from the bonds transferred and delivered to the said The Northern Trust Company, as above set out.

"Paragraph (b). Said The Northern Trust Company shall keep separate accounts with each of second parties, and shall collect the dividends received from each 1,000 shares of stock transferred by each of second parties who shall have transferred stock hereunder, and shall pay from the dividends received from each 1,000 shares of stock one-seventh of all payments which shall be made in accordance with Paragraph 1 of said agreement of December 2, 1912, and one-seventh of all moneys which Charles N. Crane and Richard T. Crane, Junior, have transferred to said The Northern Trust Company, to pay, and said The Northern Trust Company shall pay the remainder of said dividends, if any there shall be, to the person who deposited said 1,000 shares of stock. In addition thereto said The Northern Trust Company shall collect all interest which may be paid on said \$199,000 face value of bonds, and shall pay therefrom one-seventh of all payments which shall be made in accordance with Paragraph 1 of said agreement of December 2, 1912, and one-seventh of all moneys which Charles N. Crane and Richard T. Crane, Junior, have transferred in said agreement of December 2, 1912, to pay. And said The Northern Trust Company shall pay the remainder of such interest, if any there shall be, to said Charles N. Crane.

"Paragraph (c). In the event that any of said second parties shall die prior to the death of said William W. Washburn, said The Northern Trust Company shall pay to the executors, administrators and assigns of the person who shall so have died, all moneys which would have been paid to such person had he or she not died.

"Paragraph (d). Upon the death of the said William W. Washburn, said The Northern Trust Company, as Trustee, shall transfer and deliver to each of second parties, and in the event of the death of any of second parties then to their executors, administrators and assigns, the stock or bonds so transferred and delivered by them to the said

The Northern Trust Company, as Trustee, as hereinabove set out,"
(Italics ours.)

9 Paragraph 2 of the agreement of December 2, 1912, between Charles R. and Richard T., Jr., and the widow of Richard T. Crane, deceased, provides for the payment, quarterly, of so much of the dividends and income of certain securities as is necessary to make her net annual income, including the net amount of income which she shall receive from the marriage settlement agreement and the Atchison bonds, the sum of \$100,000. Each of the parties to the trust agreement (Exhibit E) authorized the trustee to pay his or her one-seventh of all payments which were to be made in accordance with said Paragraph 2 to Mrs. Junkin. This trust agreement did not modify the personal obligation assumed by each of the members of the Crane family to pay one-seventh of any deficit which might arise. At the time of the signing of the trust agreement, all of the parties undoubtedly expected that the income from the securities so deposited with the Trust Company, together with the income from the Atchison bonds which had been given to Mrs. Junkin by the terms of the ante-nuptial agreement, would be amply sufficient to provide for the payment of the guaranteed income of \$100,000. The record shows that the Crane Company paid a dividend of eighteen per cent in one year, and it was not until it passed its dividend on March 15, 1932, that a deficit arose. This is not the first law suit that was born of the great depression. Three of the Crane children, Frances C. Lillie, Mary C. Russell and Emily C. Chadbourne, have each paid their respective shares of the deficit in full, and they are not parties to this appeal. The complaint as amended alleges that "since the execution of said Trust Agreement of June 11, 1914, plaintiff [The Northern Trust Company], as such Trustee, has rendered to each of the parties thereto separate statements of account, as provided thereby, showing the income received by plaintiff from said securities, and the application thereof, and, since the same arose as aforesaid, showing the amount of the current deficits

The Northern Trust Company, as Trustee, as hereinabove set out."

(Italics ours.)

Paragraph 2 of the agreement of December 2, 1912, between Charles H. and Richard T., Jr., and the widow of Richard T. Crane, deceased, provides for the payment, quarterly, of so much of the dividends and income of certain securities as is necessary to make her net annual income, including the net amount of income which she shall receive from the marriage settlement agreement and the Atchison bonds, the sum of \$100,000. Each of the parties to the trust agreement (Exhibit B) authorized the trustee to pay into or out one-seventh of all payments which were to be made in accordance with said Paragraph 2 to Mrs. Thelma. This trust agreement did not modify the personal obligation assumed by each of the members of the Crane family to pay one-seventh of any deficit which might arise. At the time of the signing of the trust agreement, all of the parties undoubtedly expected that the income from the securities so deposited with the Trust Company, together with the income from the Atchison bonds which had been given to Mrs. Thelma by the terms of the ante-nuptial agreement, would be amply sufficient to provide for the payment of the guaranteed income of \$100,000. The record shows that the Trust Company paid a dividend of six hundred and thirty-four dollars, and it was not until it passed its dividend on March 15, 1913, that a deficit arose. This is not the first time that such a deficit of the great depression. Three of the Crane children, Frances C. Little, Mary C. Russell and Emily C. Chadbourne, have each paid their respective shares of the deficit in full, and they are not parties to this appeal. The complaint as amended alleges that "since the execution of said Trust Agreement of June 11, 1914, plaintiff [The Northern Trust Company], as such Trustee, has rendered to each of the parties thereto separate statements of account, as provided thereby, showing the income received by plaintiff from said securities, and the application thereof, and, since the same arose as aforesaid, showing the amount of the current deficits

and the amount due from them, respectively, on account thereof, and has made demand upon each of them for immediate payment thereof. Each of the said parties has heretofore recognized his or her liability for their respective shares of such deficits as provided by said 'Family Settlement Agreement,' and the said parties by their acts have construed the said agreement to obligate them to pay their proportionate shares of such deficit quarterly as the same arises." The testimony shows that in accordance with the provisions of the trust agreement (Exhibit E), separate accounts were kept by the trustee, and statements were rendered to each member of the family, quarterly, down to the time of the filing of the instant complaint, a period of nearly twenty-three years. It appears that these statements were rendered by The Northern Trust Company, "as Trustee for Emily H. Junkin, under an agreement dated December 2, 1912, between Charles P. Crane and Richard T. Crane, Jr., and under a supplemental agreement dated June 11, 1914, between those parties and Herbert P. Crane, Kate C. Gartz, Mary C. Russell and Emily C. Chadbourne, covering the quarter year ending June 2, 1938, * * * to each of the members of the family, that is, the parties interested; and statements substantially in the same form were rendered from June 2, 1922, down to date." From and after June 2, 1922, the date of the agreement between Charles R. and Richard T., Jr., with Mrs. Junkin, by which her guaranteed income was reduced from \$100,000 to \$85,000 per year, the statements were rendered in accordance with the written orders of Mrs. Junkin to the Trust Company and showed the basis upon which the same were made, and that Charles R. and Richard T., Jr., were being charged on the basis of \$85,000 and the other members of the family were being charged on the basis of \$100,000 per year, and no objection was ever made by any of the members of the family to the statements as rendered. Herbert P. called upon Harold H. Rockwell, trust officer and vice president of The Northern Trust Company, in reference to the deficits that had accrued, but made no objections to any of the statements rendered to him by the trustee, nor did he deny his liability as shown by said

and the amount due from him, respectively, as shown therein, and has made demand upon each of them for immediate payment thereof. Each of the said parties has acknowledged its or her liability for their respective shares of such deficits as provided by said 'Family Settlement Agreement,' and the said parties by their acts have consented the said agreement to obligate them to pay their proportionate shares of such deficits quarterly as the same arise." The testimony shows that in accordance with the provisions of the trust agreement (Exhibit B), separate accounts were kept by the trustee, and statements were rendered to each member of the family, quarterly, down to the time of the filing of the instant complaint, a period of nearly twenty-three years. It appears that these statements were rendered by The Northern Trust Company, "as Trustee for Emily H. Tunkin, under an agreement dated December 2, 1912, between Charles E. Crane and Richard T. Crane, Jr., and under a supplemental agreement dated June 11, 1914, between these parties and Herbert T. Crane, late of Seattle, Wash. D. C., and Emily H. Chadbourne, covering the quarter year ending June 2, 1915, * * * to each of the members of the family, that is, the parties interested; and statements substantially in the same form were rendered from June 2, 1922, down to date." From and after June 2, 1922, the date of the agreement between Charles E. and Richard T., Jr., with Mrs. Tunkin, by which her personal interest was valued at \$100,000 to \$25,000 per year, the statements were rendered in accordance with the written orders of Mrs. Tunkin to the Trust Company and showed the basis upon which the same were made, and that Charles E. and Richard T., Jr., were being charged on the basis of \$25,000 and the other members of the family were being charged on the basis of \$100,000 per year, and no objection was ever made by any of the members of the family to the statements as rendered. Herbert H. Tunkin, upon Emily H. Tunkin, Trust Officer and Vice President of The Northern Trust Company, in reference to the deficits that had accrued, but made no objections to any of the statements rendered to him by the trustee, nor did he deny his liability as shown by said

statements. A. F. Gartz, Jr., made no objection to the amount of the deficits shown by the statements to be due from Kate C. Gartz, and after the closing of the estate of Richard T., Jr., A. F. Gartz wrote the trustee a letter, received by the latter on January 24, 1933, reading: "Enclosed you will please find a check to your order for \$2852.51, being the amount of deficit on Mrs. Junkin's trust due from Kate C. Gartz." (Italics ours.) On September 24, 1935, Gartz paid to the trustee the sum of \$10,000 and received from the trustee the following receipt: "Received the sum of \$10,000 from A. F. Gartz, Jr., Trustee for Kate C. Gartz to apply on deficit in her share of the payment due Emily H. Junkin under the terms of agreement dated June 11, 1914." (Italics ours.) On January 29, 1936, Gartz paid to the trustee the sum of \$20,830.48, and received from the trustee "a release running to A. F. Gartz, Jr., Trustee for Kate C. Gartz on account of the deficit of Mrs. Gartz in her contribution to the annuity fund of Emily H. Junkin in the sum of \$20,830.48." Until the filing of their answers neither of the appellants had made any objection to the form of the trustee's statements or to the amounts shown by the statements to be due from time to time on account of the existing deficits. The trial court, in his opinion, commented upon the practice followed by the trustee and the parties to the trust, and held that they knew "what the trustee was doing, how the trustee was stating the account; and their own actions put a stamp of approval on the conduct of the trustee." It is clear that the present contention of the appellants is an afterthought and that over a period of many years all of the parties recognized that the trustee was keeping its accounts correctly. The appellants are now estopped from claiming that the trustee kept its accounts incorrectly.

The trial court held that Kate C. Gartz, Frances C. Lillie, Emily C. Chadbourne, Mary C. Russell and Herbert P. Crane were each liable to plaintiffs to the extent of one-seventh of the deficit. We affirm the court's ruling in that regard.

We affirm the court's ruling in that regard.

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appellants are now estopped from claiming that the trustee kept its

recognized that the trustee was keeping its accounts correctly. The

afterthought and that over a period of many years all of the parties

It is clear that the present contention of the appellants is an

own actions put a stamp of approval on the conduct of the trustee."

trustee was doing, how the trustee was stating the account; and their

and the parties to the trust, and held that they knew "what the

in his opinion, commented upon the practice followed by the trustee

time to time on account of the existing deficits. The trial court,

statements or to the amounts shown by the statements to be due from

appellants had made any objection to the form of the trustee's

\$20,830.48." Until the filing of their answers neither of the

contribution to the annuity fund of Emily M. Jenkins in the sum of

for Kate C. Garza on account of the deficit of Mrs. Garza in her

from the trustee "a release running to A. F. Garza, Jr., Trustee

1936, Garza paid to the trustee the sum of \$20,830.48, and received

agreement dated June 11, 1914." (Italics ours.) On January 29,

has shown in the account due Emily M. Jenkins under the terms of

A. F. Garza, Jr., Trustee for Kate C. Garza to apply on deficit in

the trustee the following receipt: "Received the sum of \$10,000 from

1937, Garza paid to the trustee the sum of \$10,000 and received from

trust due from Kate C. Garza." (Italics ours.) On September 24,

order for \$28,832.71, being the amount of deficit on Mrs. Jenkins's

1933, reading: "Enclosed you will please find a check to your

wrote the trustee a letter, received by the latter on January 24,

and after the closing of the estate of Richard F., Jr., A. F. Garza

the deficits shown by the statements to be due from Kate C. Garza,

statements. A. F. Garza, Jr., made no objection to the amount of

But the appellants contend that, in any event, since the liability of Charles R. and Richard T., Jr., in reference to the annuity was reduced by the agreement of June 2, 1922, from \$100,000 to \$85,000 the agreement of June 11, 1914, could not impose on the other members of the Crane family a liability as to the annuity deficits greater than the "high bidder" could be compelled to pay; that after June 2, 1922, the "high bidder," Richard T. Crane, Jr., could not be compelled to contribute to a deficit existing on any basis other than \$85,000 per annum, and therefore \$85,000 per annum was the basis for calculation of the annual deficits so far as the other members of the Crane family were concerned; that the trustee, in continuing to charge the other members of the Crane family with one-seventh of the amount which would have been required to pay the widow on the basis of an annual income of \$100,000, failed to give proper effect to the reduction in the annuity fund as provided for by the agreement of June 2, 1922. At first blush there would seem to be equity in this contention, but a careful consideration of the question involved convinces us that there is no merit in it. The agreement of December 2, 1912, constituted an obligation which inured to the benefit of Emily M. Junkin, and the obligation of each member of the Crane family under the family settlement agreement of June 11, 1914, was a several and not a joint obligation. The agreement of June 11, 1914, signed by Charles R. Crane and Richard T. Crane, Jr., recites: (Article II) "Within thirty days after the terms and form of the bonds and mortgage or trust deed hereinafter provided for shall have been agreed upon, and Herbert P. Crane, Kate C. Gartz, Mary C. Russell, Frances C. Lillie and Emily C. Chadbourne (who together with the parties hereto are the sole surviving children of Richard T. Crane, deceased) shall have executed their several consents to the terms of this contract, in the form hereto attached * * *." Article XI recites: "* * * therefore, the said Kate C. Gartz, Frances C. Lillie, Mary C. Russell, Emily C. Chadbourne and Herbert P. Crane do severally agree to pay on demand one-seventh of all money which may be due and payable under said agreement of December 2, 1912."

But the appellants contend that, in any event, since the liability of Charles H. and Richard T., Jr., in reference to the annuity was reduced by the agreement of June 2, 1922, from \$100,000 to \$85,000 the agreement of June 11, 1914, could not impose on the other members of the Crane family a liability as to the annuity deficits greater than the "high bidder" could be compelled to pay; that after June 2, 1922, the "high bidder", Richard T. Crane, Jr., could not be compelled to contribute to a deficit existing on any basis other than \$85,000 per annum, and therefore \$35,000 per annum was the basis for calculation of the annual deficits so far as the other members of the Crane family were concerned; that the appellees, in continuing to charge the other members of the Crane family with one-seventh of the amount which would have been required to pay the widow on the basis of an annual income of \$100,000, failed to give proper effect to the reduction in the annuity fund as provided for by the agreement of June 2, 1922. At first blush there would seem to be equity in this contention, but a careful consideration of the question involved convinces us that there is no merit in it. The agreement of December 2, 1912, constituted an obligation which inured to the benefit of Emily H. Junkin, and the obligation of each member of the Crane family under the family settlement agreement of June 11, 1914, was a several and not a joint obligation. The agreement of June 11, 1914, signed by Charles H. Crane and Richard T. Crane, Jr., recites: (Article II) "Within thirty days after the terms and form of the bonds and mortgages or trust deed hereinafter provided for shall have been agreed upon, and Herbert F. Crane, Kate C. Garza, Mary C. Russell, Frances C. Lillie and Emily C. Chabourne (who together with the parties hereto are the sole surviving children of Richard T. Crane, deceased) shall have executed their several consents to the terms of this contract, in the form hereto attached * * *". Article XI recites: " * * therefore, the said Kate C. Garza, Frances C. Lillie, Mary C. Russell, Emily C. Chabourne and Herbert F. Crane do severally agree to pay on demand one-seventh of all money which may be due and payable under said agreement of December 2, 1912."

Article XVII recites: "* * * and the parties who have executed the consent attached hereto severally agree that they accept the stock allotted to them in Article X * * *." The so-called consent agreement contains the following: "* * * we, the undersigned, being children of Richard T. Crane, deceased, and stockholders in the Crane Company, do severally hereby agree, each with the other, and with the said Charles R. Crane and Richard T. Crane, Junior, to all the terms and conditions of said agreement, so far as the same affect the Crane Company, or ourselves * * *." In several other places in the "consent" agreement the words "severally agree" are used. In the trust agreement of June 11, 1914, The Northern Trust Company is directed to keep separate accounts with each of the parties and to pay from the dividends received from each 1,000 shares of stock transferred by each to the trustee one-seventh of all payments to Mrs. Junkin which shall be made in accordance with paragraph 2 of the agreement of December 2, 1912. The reduction in the amount of the guaranteed income to \$85,000 by the contract of June 2, 1922, did not affect the obligations of the other members of the Crane family under the family settlement agreement. Charles R. Crane and Richard T. Crane, Jr., in order to secure the agreement of June 2, 1922, were obliged to release Mrs. Junkin from certain obligations and undertakings assumed by her in the contract of December 2, 1912. Any member of the family might, for a consideration satisfactory to Mrs. Junkin, release himself or herself in whole or in part, of the obligation imposed by the family settlement. As we have heretofore shown, the appellants for many years construed the agreement in question to obligate them to pay, quarterly, to Mrs. Junkin their proportionate shares of any deficit. It would work a grave injustice to The Northern Trust Company, as Trustee, if the instant contention of appellants were sustained.

Several other contentions are argued by appellants in their brief, but it would unduly lengthen this already long opinion to analyze and comment upon the same. Suffice it to say that

Article XVII recites: " * * and the parties who have executed the consent attached hereto severally agree that they accept the stock allotted to them in Article X * * ". The so-called consent agreement contains the following: " * * we, the undersigned, being children of Richard T. Crane, deceased, and stockholders in the Crane Company, do severally hereby agree, each with the other, and with said Charles R. Crane and Richard T. Crane, Junior, to all the terms and conditions of said agreement, no far as the same affect the Crane Company, or ourselves * * ". In several other places in the "consent" agreement the words "severally agree" are used. In the first agreement of June 11, 1914, The Northern Trust Company is directed to keep separate accounts with each of the parties and to pay from the dividends received from each 1,000 shares of stock transferred by each to the trustee one-seventh of all payments to Mrs. Junkin which shall be made in accordance with paragraph 2 of the agreement of December 2, 1912. The reduction in the amount of the guaranteed income to \$85,000 by the contract of June 2, 1922, did not affect the obligations of the other members of the Crane family under the family settlement agreement. Charles R. Crane and Richard T. Crane, Jr., in order to secure the agreement of June 2, 1922, were obliged to release Mrs. Junkin from certain obligations and undertakings assumed by her in the contract of December 2, 1912. Any member of the family might, for a consideration satisfactory to Mrs. Junkin, release himself or herself in whole or in part, of the obligation imposed by the family settlement. As we have previously shown, the appellants for many years construed the agreement in question to obligate them to pay quarterly to Mrs. Junkin their proportionate shares of any deficit. It would seem a grave injustice to The Northern Trust Company, as trustee, at the instant convention of appellants were sustained.

Several other contentions are argued by appellants in their brief, but it would unduly lengthen this already long opinion to analyze and comment upon the same. Suffice it to say that

we find no merit in any of them.

Since the appeal was taken to this court Charles R. Crane died and Central Hanover Bank & Trust Company and Lawrason Riggs, Jr., as executors of the last will and testament of Charles R. Crane, deceased, were substituted as appellees.

The decree of the Circuit court of Cook county is affirmed.

DECREE AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

we find no merit in any of them.

Since the appeal was taken to this court Charles H.

was tried and General Harvey was a third defendant and

Lawrence Higgs, Jr., an associate of the last firm and

testament of Charles H. Higgs, deceased, were admitted

as appellants.

The decree of the Circuit court of Cook county is

affirmed.

THOMAS SWANSON,

Plaintiff, v. J. J. and Sullivan, J. J. County,

40824

DR. T. E. HARDY,
Appellant,

v.

ALBERT J. HORAN, Bailiff
of the Municipal Court of
Chicago,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

307 I.A. 380²

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

T. E. Hardy sued Albert J. Moran, Bailiff of the Municipal court of Chicago, for damages. In a trial of the cause without a jury the court found the issues against plaintiff and entered judgment in favor of defendant. Plaintiff appeals.

Plaintiff's statement of claim alleges that on February 3, 1938, judgment was entered in his favor against the Kessler Motor & Engineering Corporation for \$4,885.46, in the Superior court of Cook county; that on the same date a writ of execution was placed in the hands of the sheriff, and "that thereby and from that time plaintiff procured and at all times since had a lien upon all of the personal property of said judgment debtor. 2. That notwithstanding said lien, the defendant did levy at two separate times executions upon personal property of said judgment debtor and did sell said property at execution sale as follows: Writ * * * levied March 11, 1938, and sale, March 22, 1938 for \$300 to M. Klass of the following property: * * * [Here follows a description of the personal property.] Writ * * * levied March 22, 1938, and sale April 1, 1938 to A. Rice for \$211 of the following property: * * * [Here follows a description of the personal property.] The proceeds of each of said sales satisfied the claims of the judgment creditor in each of said executions which was the Illinois Malleable Iron Company. 3. That said property was delivered by defendant to the aforesaid respective purchasers. 4. That the property thus sold was greatly in excess of the amounts bid therefor, and that said sales, and delivery resulted in depriving plaintiff of his rights in

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RECEIVED FROM MEMORIAL

MR. T. E. HANBY
ALBERT J. HANBY
CHICAGO, ILL.

307 I.A. 380

MR. JUSTICE SCAMMEL DELIVERED THE OPINION OF THE COURT.

T. E. Hanby sued Albert J. Hanby, Plaintiff of the Municipal

court of Chicago, for damages. In a trial of the cause without a jury the court found the issues against plaintiff and entered judgment in favor of defendant. Plaintiff appeals.

Plaintiff's statement of claim alleges that on February 3, 1938, judgment was entered in his favor against the Kessler Motor & Engineering Corporation for \$4,887.46, in the Superior court of Cook county; that on the same date a writ of execution was placed in the hands of the sheriff, and "that thereby and from that time plaintiff procured and at all times since had a lien upon all of the personal property of said judgment debtor. 2. That notwithstanding said lien, the defendant did levy at two separate times executions upon personal property of said judgment debtor and did sell said property at execution sale as follows: Writ * * * levied March 11, 1938, and sale, March 22, 1938 for \$300 to M. Klass of the following property: * * * [Here follows a description of the personal property.] Writ * * * levied March 22, 1938, and sale April 1, 1938 to A. Rice for \$211 of the following property: * * * [Here follows a description of the personal property.] The proceeds of each of said sales satisfied the claims of the judgment creditor in each of said executions which was the Illinois Malleable Iron Company. 3. That said property was delivered by defendant to the aforesaid respective purchasers. 4. That the property thus sold was greatly in excess of the amounts bid therefor, and that said sales, and delivery resulting in depriving plaintiff of said

and lien upon the above described personal property; by virtue of which he has suffered a loss and injury to the extent of the value of the property, namely \$990, for which damages he brings this suit."

The following facts are undisputed: On February 14, 1936, Illinois Malleable Iron Company leased the premises at 7720-7722 South Racine avenue to Kessler Motor & Engineering Corporation. The lease was in writing and expired February 28, 1938. On February 2 or 3, 1938, a judgment by confession upon a promissory note was entered in the Superior court in favor of plaintiff and against Kessler Motor & Engineering Corporation in the sum of \$4,885.46. The record of the judgment introduced omits the promissory note, or a copy of the same. The date of the note is not shown. On February 3, 1938, an execution was delivered by plaintiff's attorney to the sheriff of Cook county. On February 25, 1938, a distress warrant was served on Kessler Motor & Engineering Corporation by the Illinois Malleable Iron Company and possession was taken of certain personal property of the Kessler Corporation. On February 26, 1938, distress proceedings were commenced in the Municipal court by said landlord against said tenant. On March 5, 1938, forcible entry and detainer proceedings were commenced by said landlord against said tenant. On March 11, 1938, a judgment was entered in favor of the landlord in the distress suit, execution was delivered to defendant, **Bailiff** of the Municipal court, and personal property of the tenant was seized and levied on by defendant. On March 15, 1938, a judgment for possession and rent was entered in favor of the landlord and against the tenant, and on March 17, 1938, execution was delivered to defendant. On March 22, 1938, a sale was held by defendant under the distress for rent execution; also certain personal property of the tenant was seized and a levy made under the forcible detainer execution. On April 1, 1938, a sale was held by defendant under the forcible detainer execution. On April 20, 1938, defendant was notified for the first time of the existence of plaintiff's execution. The instant suit was filed on April 30, 1938. On May 3, 1938, the sheriff made the following return on plaintiff's execution, "No Property Found and No Part Satisfied."

and lien upon the above described personal property by virtue of which he has suffered a loss and injury to the extent of the value of the property, namely \$200, for which damages he brings this suit."

The following facts are undisputed: On February 14, 1936, Illinois Malleable Iron Company leased the premises at 7720-7722 South Racine Avenue to Kessler Motor & Engineering Corporation. The lease was in writing and expired February 28, 1938. On February 8 or 9, 1938, a judgment by confession upon a promissory note was entered in the Superior Court in favor of plaintiff and against Kessler Motor & Engineering Corporation in the sum of \$4,837.46. The record of the judgment introduced with the promissory note, or a copy of the same. The date of the note is not known. On February 1, 1938, an execution was delivered by plaintiff's attorney to the Sheriff of Cook County. On February 25, 1938, a distress warrant was served on Kessler Motor & Engineering Corporation by the Illinois Malleable Iron Company and possession was taken of certain personal property of the Kessler Corporation. On February 25, 1938, a distress warrant was issued in the Municipal Court by said landlord against said tenant. On March 2, 1938, Sheriff Cook and his deputy proceeded to the premises of said tenant and seized and removed the same. On March 11, 1938, a judgment was entered in favor of the landlord in the distress suit; execution was delivered to defendant; Bailiff of the Municipal Court, and personal property of the tenant was seized and levied on by defendant. On March 15, 1938, a judgment for possession and rent was entered in favor of the landlord and against the tenant, and on March 17, 1938, execution was delivered to defendant. On March 22, 1938, a sale was held by defendant under the distress for rent execution; also certain personal property of the tenant was seized and a levy made under the forcible detainer execution. On April 1, 1938, a sale was held by defendant under the forcible detainer execution. On April 30, 1938, defendant was notified for the first time of the existence of plaintiff's execution. The instant suit was filed on April 30, 1938. On May 2, 1938, the sheriff was the following return on plaintiff's execution, "The property named and the first mentioned."

The contention of defendant, in the trial court, and here, is that plaintiff lost the lien of his execution by failing to use diligence in enforcing it, and the trial court was evidently of the opinion that the facts sustained the contention. That a creditor may lose the lien of his execution by failing to use diligence in enforcing it is clear. In *Freeman on Executions* (3d Ed.), Vol. 2, sec. 206, the author states:

"By the statute of 13 Elizabeth, c. 5, executions taken out with intent to hinder, delay, or defraud creditors, or others, are, as against the persons sought to be hindered, delayed, or defrauded, utterly void. The operation of this statute upon the lien of executions has been the subject of very frequent judicial decisions, and of occasional judicial dissension. According to a very considerable preponderance of the authorities, no actual intent to hinder, delay, or defraud any one need be shown. What was the intent is a conclusion to be drawn from the acts or words of the plaintiff in execution. If what he did or acquiesced in was of a character to hinder, delay or defraud other creditors of the defendant, his attempted use of the writ is, in contemplation of law, fraudulent, and hence no lien or other advantage can result therefrom as against such other creditors, nor even against innocent encumbrancers and purchasers.

"An execution and its lien may be avoided by such conduct on the part of the plaintiff as shows an improper use of his writ, though the motives influencing such conduct, instead of being fraudulent, were grounded in kindness and charity toward the defendant, and free from the slightest design to injure others. The only proper use of an execution is to enforce the collection of a debt, and to enforce it with a considerable degree of diligence. To employ it for other objects is inconsistent with its nature, and such a perversion from its legitimate purposes as brings upon it the penalty prescribed by the statute of Elizabeth. The plaintiff in execution may desire to allow the defendant time in which to make payment, and yet may wish to save himself from all hazard arising from his delay to enforce the collection of his judgment. He is likely, therefore, to take out

The contention of defendant, in the trial court, and here, is that plaintiff lost the lien on his execution by failing to use diligence in enforcing it, and the trial court was evidently of the opinion that the facts sustained this contention. That a creditor may lose the lien on his execution by failing to use diligence in enforcing it is clear. In Freeman on Executions (3d Ed., Vol. 2, sec. 206), the author states:

"By the statute of 18 Elizabeth, c. 5, execution taken out with intent to hinder, delay, or defraud creditors, or others, and as against the persons sought to be hindered, delayed, or defrauded, is utterly void. The operation of this statute upon the lien of execution has been the subject of very frequent judicial decisions, and of occasional judicial discussion. According to a very considerable preponderance of the authorities, no actual intent to hinder, delay, or defraud any one need be shown. What was the intent as a conclusion to be drawn from the acts or words of the plaintiff in execution. If what he did or suggested in way of a character to hinder, delay, or defraud other creditors of the defendant, his attempted use of the writ is, in contemplation of law, fraudulent, and hence no lien or other advantage can result therefrom as against such other creditors, and every claim against such estate is barred."

"An execution and lien may be avoided by such conduct on the part of the plaintiff as shows an improper use of his writ, though the motives influencing such conduct, instead of being fraudulent, were grounded in kindness and charity toward the defendant, and free from the slightest design to injure others. The only proper use of an execution is to enforce the collection of a debt, and to enforce it with a considerable degree of diligence. To employ it for other objects is inconsistent with its nature, and such a perversion from its legitimate purposes as brings upon it the penalty prescribed by the statute of Elizabeth. The plaintiff in execution may desire to allow the defendant time in which to make payment, and yet not wish to waive himself from all debts arising from that delay to enforce the collection of his judgment. He is likely, therefore, to take out

execution with a view to binding defendant's property, but with no intent to make any immediate levy or sale. In other words, he seeks to convert an execution into a mere mortgage. This the law does not tolerate. Whenever it can be shown that the object of the writ was merely to obtain better security for the debt, it is fraudulent as against subsequent purchasers or encumbrancers, and outranked by subsequent executions. Rarely has this object been proclaimed by the plaintiff in execution. It is inferable from express direction to an officer not to proceed with a levy or a sale, or from any language or course of conduct from which the conclusion may fairly be drawn that the plaintiff did not intend to make his writ immediately productive, but rather to secure the advantage of a lien on the property of the defendant." In support of his statements of the law the author cites a number of cases, including Sweetser v. Matson, 153 Ill. 568, 582, and Everingham v. National City Bank, 124 Ill. 527, 536.

Plaintiff was a stockholder in the Kessler Motor & Engineering Corporation and his attorney "took care of the records and minutes of the company" from the time that plaintiff bought the stock. Plaintiff's attorney knew that the Kessler company was in financial trouble and that the plant was closed. He testified that after securing the confession of judgment he took the writ to the execution window of the sheriff's office; that he attached to the writ, by a paper clip, a separate piece of paper upon which was written the address of the defendant in the suit; that he handed the writ to the clerk behind the window and the clerk asked him if he wanted it returned nulla bona or if he wanted a lien served, and he told the clerk that he wanted it made a lien and to be served; that he also told the execution clerk that he had been informed that the landlord who owned the building had placed a padlock on the doors of the plant and that so far as he knew there was nobody at the plant; that the clerk told him the fee would be \$2.60 and he paid that amount and got a receipt for it; that he gave the sheriff no other instructions in reference to the writ; that he first learned that the land-

execution with a view to binding defendant's property, but with no intent to make any immediate levy or sale. In other words, he seems to convert an execution into a mere mortgage. This the law does not tolerate. Whenever it can be shown that the object of the writ was merely to obtain better security for the debt, it is fraudulent as against subsequent purchasers or encumbrancers, and outwitted by subsequent executions. Hereby has this object been proclaimed by the plaintiff in execution. It is inferable from express direction to an officer not to proceed with a levy or a sale, or from any language or course of conduct from which the conclusion may fairly be drawn that the plaintiff did not intend to make his writ immediately productive, but rather to secure the advantage of a lien on the property of the defendant." In support of his statements of the law the author cites a number of cases, including Wheeler v. Watson, 123 Ill. 568, 582, and Wheeler v. Watson, 124 Ill. 327, 336.

Plaintiff was a stockholder in the Kessler Beer & Ice Company and his attorney "took care of the records and minutes of the company" from the time that plaintiff bought the stock. Plaintiff's attorney knew that the Kessler company was in financial trouble and that the plant was closed. He testified that after securing the confession of judgment he took the writ to the execution window of the sheriff's office; that he attached to the writ, by a paper clip, a separate piece of paper upon which was written the address of the defendant in the writ; that he handed the writ to the clerk behind the window and the clerk asked him if he wanted it returned nulla bona or if he wanted a lien served, and he told the clerk that he wanted it made a lien and to be served; that he also told the execution clerk that he had been informed that the landlord who owned the building had placed a padlock on the doors of the plant and that so far as he knew there was nobody at the plant; that the clerk told him the fee would be \$5.00 and he paid that amount and got a receipt for it; that he gave the sheriff no other instructions in reference to the writ; that he first learned that the land-

lord had made levies on the property of the Kessler Motor & Engineering Corporation after the levies had been made; that he had known Dr. Hardy for five years before that time; that he did not know the name of the man at the sheriff's office to whom he have the writ; that he doubted very much if he would be able to identify him; that he had had occasion to place other writs with the sheriff before the one in question; "Q. * * * I say you told the sheriff to serve the writ? A. Of course, I did not tell him. He asked me if I wanted it served and I said, 'Yes;'" that he knew at the time that there was no one at the plant of the Kessler company to receive service of the writ; that the address he wrote on the paper attached to the writ was the address of the corporation; that he did not know what officer of the corporation to serve and did not give the deputy sheriff the name of any officer to serve; that he told the deputy sheriff that he did not know who was the president of the corporation.

The original writ was introduced in evidence. It had a large capital "C" endorsed on it. It did not have attached to it, by a paper clip, a separate piece of paper upon which was written the address of the defendant in the suit. No address appears on the writ. Edward McCarthy testified that he was execution clerk at the sheriff's office and had occupied that position for eleven years. The witness, after he was shown a photostatic copy of the writ with the return thereon, testified that the large capital "C" on the writ meant that it was a case writ, that is, a writ to be kept in the files for ninety days unless the attorney came in and signed an order blank to return it to the file; that a case writ "constitutes a nulla bona return at the end of ninety days;" that the writ in question with the return thereon constituted a nulla bona return and the return was put on at the end of ninety days, "at the time of the expiration of the writ;" "Q. This is a case writ, isn't it, Mr. McCarthy? A. That is a case writ;" that a writ is called a case writ where the attorney really does not want it served. The witness was then shown the original writ and after examining it testified that it is a case

Lord had made levies on the property of the Kessler Motor & Engineering Corporation after the levies had been made; that he had known Dr. Hardy for five years before that time; that he did not know the name of the man at the sheriff's office to whom he have the writ; that he doubted very much if he would be able to identify him; that he had had occasion to place other writs with the sheriff before the one in question; "Q. * * * I say you told the sheriff to serve the writ? A. Of course, I did not tell him. He asked me if I wanted it served and I said, 'Yes,' that he knew at the time that there was no one at the plant of the Kessler company to receive service of the writ; that the address he wrote on the paper attached to the writ was the address of the corporation; that he did not know what officer of the corporation to serve and did not give the deputy sheriff the name of any officer to serve; that he told the deputy sheriff that he did not know who was the president of the corporation.

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writ; that he generally has the attorney put the address on the face of the execution; that sometimes the attorneys bring in a slip of paper with the address on it but that he generally takes the slip off and writes the address on the writ. The following then occurred: "Q. Now, if that writ were to be taken with directions for actual service at 7720 South Racine Avenue, would the fee be \$2.60? A. No, it couldn't be. Q. Couldn't be, that is right, isn't it? A. Yes. Q. But in the case of a case writ, the writ which is merely to be held for ninety days until it expires, that fee would be \$2.60 as indicated on the writ? A. Right." The witness further testified that if the writ was placed for service the fee including mileage would approximate \$3.50. The writ itself and the sheriff's receipt for fees both show that \$2.60 was paid when the writ was delivered to the sheriff. There is nothing in the record that would warrant an inference that the sheriff acted dishonestly in the matter of this writ.

Plaintiff was a stockholder in the Kessler Corporation and was able to secure from that corporation the judgment note in question. Plaintiff's attorney took care of the corporate books and minutes of that corporation, yet, upon the witness stand he attempted to convey the impression that he was not sure of the address of the plant of the corporation. He testified that he did not know the address of the president of the corporation; that he did not know what property the corporation had in its plant and that he did not know the location of any chattels that belonged to the corporation. He admitted, however, that he told the execution clerk that the landlord had padlocked the premises, and it is evident that he then knew the corporation had defaulted in the payment of the February rent. As a lawyer he knew that the landlord had the right to distrain for rent, yet, after he placed the writ in the hands of the sheriff he never inquired of that official as to the execution of the writ. Defendant's affidavit of defense alleges that plaintiff "had at all times knowledge of levy of the distress warrant and the levy of execution by this defendant, but did not take any steps to make his writ of execution a lien upon the personal property in question." Plaintiff filed no reply to these

that he generally has the attorney put the address on the face of the execution; that sometimes the attorney brings in a slip of paper with the address on it but that he generally takes the slip off and writes the address on the writ. The following then occurred: "Q. Now, if that writ were to be taken with directions for actual service at 7730 South Racine Avenue, would the fee be \$2.00? A. No, it couldn't be. Q. Couldn't be, what is right, isn't it? A. Yes. Q. But in the case of a case writ, the writ which is merely to be held for ninety days until it expires, that fee would be \$2.00 as indicated on the writ "A. Right." The witness further testified that if the writ was placed for service the fee including mileage would approximate \$3.70. The writ itself and the sheriff's receipt for fees both show that \$2.00 was paid when the writ was delivered to the sheriff. There is nothing in the record that would warrant an inference that the sheriff acted dishonestly in the matter of this writ. Plaintiff was a stockholder in the Kessler Corporation and was able to secure from that corporation the judgment note in question. Plaintiff's attorney took care of the corporate books and minutes of that corporation, yet, upon the witness stand he attempted to convey the impression that he was not sure of the address of the plant of the corporation. He testified that he did not know the address of the president of the corporation; that he did not know what property the corporation had in its plant and that he did not know the location of any chattels that belonged to the corporation. He admitted, however, that he told the execution clerk that the landlord had padlocked the premises, and it is evident that he then knew the corporation had defaulted in the payment of the February rent. As a lawyer he knew that the landlord had the right to distrain for rent, yet, after he placed the writ in the hands of the sheriff he never inquired of that official as to the execution of the writ. Defendant's affidavit of defense alleged that Plaintiff "had at all times knowledge of levy of the distress warrant and the levy of execution by this defendant, but did not take any steps to make his writ of execution a lien upon the personal property in question." Plaintiff filed a reply to same

allegations. On February 25 the landlord seized certain property of the corporation, and proceedings in forcible detainer and distress for rent were instituted against it. On March 11, 1938, the bailiff took possession of certain personal property of the corporation. On March 22, 1938, another levy was made by the bailiff. Two sales of the personal property of the corporation were held by the bailiff. We must presume that the property was sold pursuant to the notice and advertising that the law requires, yet, during all this time plaintiff did nothing to enforce his judgment. The Bailiff, a disinterested party, had no reason to hinder plaintiff in the assertion of his rights, and had no knowledge of plaintiff's claim until April 20, 1938, which was almost one month after the first sale, and nineteen days after the second. By April 20 the sales had been consummated and there was nothing that the Bailiff could do to aid plaintiff in enforcing his rights. There is much force in the contention of the Bailiff that plaintiff or his attorney must have known of the steps taken by the landlord to enforce its lien. There is also force in the contention that plaintiff and his attorney knew where the corporation property was to be found, yet took no steps to levy on it. Plaintiff's attorney testified that he did not tell the sheriff to make a levy but only to make his writ a lien and serve it.

We are satisfied that under the evidence in the case and the law, the trial court was justified in finding for defendant.

In this court the appellant, Dr. T. E. Hardy, and Herman Wepman, as assignee of said appellant, have filed a motion, supported by an affidavit, for the entry of an order that Herman Wepman be substituted in the cause for the appellant and that all orders and judgments hereafter entered herein be in the name and behalf of or against said Herman Wepman in lieu of Dr. T. E. Hardy, the original plaintiff and appellant. The motion was allowed.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

On February 22 the landlord raised certain property of the corporation, and proceedings in forcible detainer and distress for rent were instituted against it. On March 11, 1938, the bailiff took possession of certain personal property of the corporation. On March 22, 1938, another levy was made by the bailiff. Two sales of the personal property of the corporation were held by the bailiff, in each of which the property was sold pursuant to the writ and without claiming that the law requires, yet, during all this time plaintiff did nothing to enforce his judgment. The bailiff, a disinterested party, had no reason to hinder plaintiff in the assertion of his rights, and had no knowledge of plaintiff's claim until April 30, 1938, which was almost one month after the first sale, and nineteen days after the second. By April 30 the sales had been consummated and there was nothing that the bailiff could do to aid plaintiff in enforcing his rights. There is much force in the contention of the bailiff that plaintiff or his attorney must have known of the steps taken by the landlord to enforce its lien. There is also force in the contention that plaintiff and his attorney knew where the corporation's property was to be found, yet took no steps to levy on it. Plaintiff's attorney testified that he did not tell the sheriff to make a levy but only to make his writ a lien and serve it.

We are satisfied that under the evidence in the case and the law, the trial court was justified in finding for defendant. In this court the appellant, Dr. T. E. Keady, and Norman Wehman, as assignees of said appellant, have filed a motion, supported by an affidavit, for the entry of an order that Norman Wehman be substituted in the cause for the appellant and that all orders and judgments heretofore entered herein be in the past and behalf of or against said Norman Wehman in lieu of Dr. T. E. Keady, the original plaintiff, and appellant. The motion was allowed.

The judgment of the municipal court of Chicago is affirmed.
JUDGMENT AFFIRMED.
Friend, P. J., and Sullivan, J., concur.

40841

EMMA HILL,
Appellee,

v.

NEW YORK LIFE INSURANCE
COMPANY, a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT

OF CHICAGO.

307 I.A. 381

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, beneficiary in a policy issued by defendant, sued to recover the additional double indemnity benefits of \$3,000 on the life of William J. Kropacek, her brother. The policy was in force at the time of death and defendant paid its face value, \$3,000. A jury returned a verdict finding the issues for plaintiff and assessing her damages at \$3,175. Defendant appeals from a judgment entered upon the verdict.

The double indemnity clause of the policy provided:

"The double indemnity * * * shall be payable upon receipt of due proof that the death of the Insured resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means * * *.

"Double Indemnity shall not be payable if the Insured's death resulted from self-destruction, whether sane or insane * * *; or directly or indirectly, from infirmity of mind or body, from illness or disease * * *."

The insured died on December 27, 1937, of "a crushing injury to the head" as the result of a "fall" or "jump" from an archway window on the third floor of the Peoples Hospital to the sidewalk below. The hospital is located on Cermak road and Archer avenue, Chicago. In plaintiff's statement of claim it is alleged: "On or about December 27, 1937, while said policy was in full force and effect, said insured received personal injuries through external, violent and accidental means, to-wit: by accidental fall three stories from a fire-escape to the ground." Defendant's

40041

JOHN HILL,

Attorney

v.

NEW YORK LIFE INSURANCE
COMPANY, a corporation
of New York

OF CHICAGO.

307 I.A. 381

MR. JUSTICE ROBERTS DELIVERED THE OPINION OF THE COURT.

Plaintiff, beneficiary in a policy issued by defendant, sued to recover the additional double indemnity benefit of \$3,000 on the life of William J. Wrogocek, her brother. The policy was in force at the time of death and defendant paid its face value, \$3,000. A jury returned a verdict finding the issues for plaintiff and assessing her damages at \$3,197. Defendant appeals from a judgment entered upon the verdict.

The double indemnity clause of the policy provided: "The double indemnity * * * shall be payable upon receipt of due proof that the death of the insured resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means * * *."

"Double indemnity shall not be payable if the insured's death resulted from self-destruction, whether sane or insane * * * or directly or indirectly, from infirmity of mind or body, from illness or disease * * *."

The insured died on December 27, 1937, of "a crushing injury to the head" as the result of a "fall" or "jump" from an archway window on the third floor of the Peoples Hospital to the sidewalk below. The hospital is located on Cermak road and Archer Avenue, Chicago. In plaintiff's statement of claim it is alleged: "On or about December 27, 1937, while said policy was in full force and effect, said insured received personal injuries through external, violent and accidental means, to-wit: by accidental fall three stories from a fire-escape to the ground." Defendant's

answer to the foregoing, in its pleading, is as follows: "The defendant denies that said death was the result of external, violent and accidental means and in particular denies that said death was the result of an accidental fall from a fire-escape and avers that said death resulted from self-destruction while said insured was sane or insane and, hence, was not a death within the meaning of the double indemnity provisions of said policy or contract upon which the plaintiff sues." After verdict plaintiff was allowed to amend her pleading by striking the words "by accidental fall three stories from a fire-escape to the ground," and to insert in place thereof the words "by accidental death immediately caused and resulting from a crushed head accidentally received and suffered and not self-inflicted while sane or insane."

Plaintiff introduced the policy and a stipulation that the immediate cause of the death of William J. Kropacek was "a crushing injury to the head," and rested. Defendant's evidence is, in substance, as follows:

F. C. Francis testified that he was the head of the passenger traffic department of the Rock Island Railroad and that the deceased had been working in his department since 1921; that in December, 1937, he sent the deceased to Omaha on business for the company; that the deceased was taken ill there and was unable to stay the number of days necessary to do his work; that on the evening of December 23, 1937, he went to the home of the deceased and talked with the latter, who was then in bed; that he "sat down by the bedside and talked a little bit" with Kropacek "about his trip to Omaha;" that Kropacek told him that "he had been taken ill in Omaha, had consulted a doctor and that he felt so ~~miser~~ miserable or ill that he decided it was best to come back to Chicago," and that he returned to Chicago on the morning of the 22d; that he questioned Kropacek "about the nature of his illness and apparently his stomach was upset and his nerves, and one thing and another, but he told me that he had something on his mind that had bothered

answer to the foregoing, in its pleading, is as follows: "The

defendant denies that said death was the result of external,

violent and accidental means and in particular denies that said

death was the result of an accidental fall from a fire-escape and

averts that said death resulted from self-destruction while said

injured was sane or insane and, hence, was not a death within the

meaning of the double indemnity provisions of said policy or contract

upon which the plaintiff sues." After verdict plaintiff was allowed

to amend her pleading by striking the words "by accidental fall from

stories from a fire-escape to the ground," and to insert in place

thereof the words "by accidental death immediately caused and

resulting from a crushed head accidentally received and suffered

and was self-inflicted while sane or insane."

Plaintiff introduced the policy and a stipulation that

the immediate cause of the death of William J. Kroposch was "a

crushing injury to the head," and rested. Defendant's evidence is,

in substance, as follows:

W. C. Francis testified that he was the head of the

passenger traffic department of the Rock Island Railroad and that

the deceased had been working in his department since 1921; that

in December, 1937, he sent the deceased to Omaha on business for

the company; that the deceased was taken ill there and was unable

to stay the number of days necessary to do his work; that on the

evening of December 23, 1937, he went to the home of the deceased

and talked with the latter, who was then in bed; that he "sat down

by the bedside and talked a little bit" with Kroposch "about his

trip to Omaha"; that Kroposch told him that "he had been taken ill

in Omaha, had consulted a doctor and that he felt no worse; that or

ill that he decided it was best to come back to Chicago," and

that he returned to Chicago on the morning of the 28th; that he

questioned Kroposch "about the nature of his illness and apparently

his stomach was upset, and his nerves, and one thing and another,

but he told me that he had something on his mind that had bothered

him a great deal and he could not sleep and I asked him what it was. He said he could not tell me nor anybody. I asked him if it was something in connection with the work at the office and he said, 'No, nothing like that; something personal;' that he said to Kropacek, 'Well, if you won't tell me about it, can you talk to your brother or sister or your mother?' that Kropacek said, 'No, it is something I can't talk to anybody about;' that he then asked him what his religion was, and he said he was a Catholic, 'so I advised him that if he couldn't talk to any members of his family or me, to send for his priest and have him come over and have a talk with him,' to which Kropacek answered, 'Well, that's an idea;' that he began to give Kropacek some advice 'about taking care of himself, keeping in bed, and keeping warm and eating lightly,' and so forth, and he said he would; that Kropacek said he 'had something on his mind that affected his well-being so to speak, so he could not sleep and he was worried;' that 'after the conversation drifted around I said, 'You keep in bed and keep warm and eat lightly and you ought to be able to get through this and come back to the office next Monday.' And he said, 'No, I will never be back.' I thought that was just an idea due to his condition and so I tried to cheer him out of that and he said, 'No, I am through.' I said, 'Why do you think that?' 'Well,' he said, 'my ticker' - and he tapped his heart."

Dr. Roland P. MacKay testified that he specialized in diseases of the nervous system; that he graduated from the University of Toronto Medical School in 1925 and interned at the Henry Ford Hospital from 1925 to 1926; that he "was a fellow in neurology in the Mayo Clinic from 1926 to 1929;" that he came to Chicago in 1929 and associated with Dr. George W. Hill; that he spent one year in post graduate work in Germany in 1932 to 1933; that he was a member of the American Neurological Association and was certified as a specialist in neurological and psychiatric diseases by the Psychiatric Board of the American Neurological Association, that

him a great deal and he could not sleep and I asked him what it was. He said he could not tell me nor anybody. I asked him if it was something in connection with the work at the office and he said, 'No, nothing like that; something personal; ' that he said to Kropotkin, 'Well, if you want to tell me about it, can you talk to your brother or sister or your mother?' that Kropotkin said, 'No, it is something I can't talk to anybody about; ' that he then asked him what his religion was, and he said he was a Catholic, 'so I advised him that if he couldn't talk to any members of his family or me, to send for his priest and have him come over and have a talk with him,' to which Kropotkin answered, 'Well, that's an idea; ' that he began to give Kropotkin some advice 'about taking care of himself, keeping in bed, and keeping warm and eating lightly,' and so forth, and he said he would; that Kropotkin said he 'had something on his mind that affected his well-being so he could not sleep and he was worried; ' that 'after the conversation drifted around I said, 'You keep in bed and keep warm and eat lightly and you ought to be able to get through this and come back to the office next Monday.' And he said, 'No, I will never be back.' I thought that was just an idea due to his condition and so I tried to cheer him out of that and he said, 'No, I am through.' I said, 'Why do you think that?' 'Well,' he said, 'my father' - and he tapped his heart."

Dr. Roland T. Mackay testified that he specialized in diseases of the nervous system; that he graduated from the University of Toronto Medical School in 1907 and interned at the Henry Ford Hospital from 1907 to 1909; that he "was a fellow in neurology in the Mayo Clinic from 1909 to 1912; " that he came to Chicago in 1912 and associated with Dr. George W. Hill; that he spent one year in post graduate work in Germany in 1912 to 1913; that he was a member of the American Neurological Association and was certified as a specialist in neurological and psychiatric diseases by the Psychiatric Board of the American Neurological Association, that

he was "senior in neurology at St. Luke's Hospital" and an associate professor at the University of Illinois; that on Sunday December 27 [26], 1937, the day before the death of Kropacek, he was called as a physician to the Kropacek home about two o'clock p.m. and found Kropacek in bed in the front room upstairs; that he made an examination of him at that time, and that present during the examination were two or three brothers of Kropacek, "perhaps a sister, and I think his mother;" that after he had talked with Kropacek for a few minutes, "or tried to," he "carried out a neurological examination on him, that is, a physical examination with special reference to any disturbance of his nervous system;" that he examined "all those functions of the body that the nervous system carries out, such as pupillary reactions, the presence or absence of muscular power in various parts of the body, presence or absence of various reflexes that are normally found, and the existence of normal or abnormal sensations anywhere in the body;" that he examined the patient's mental condition; "Q. What did you observe as to Mr. Kropacek's condition as a result of his examination? A. When I saw him he was in a very acute stage of agitated depression. He was restrained with difficulty. He wanted to get up out of bed all the time. He was very agitated and restless, wringing his hands and crying, bemoaning his fate, and stating there was no hope for him and that no matter what might be done for him, he was finished." The doctor further testified that he explained the condition of the patient to his family "and pointed out he was in danger of suicide because of his depressed mental condition. * * * Because of my opinion as to his condition I prescribed * * * that he should be taken to the psychopathic hospital where he could be protected from himself." Upon recross-examination, after the doctor had stated that he did not make out a physician's affidavit for admission to the psychopathic hospital, he asked to be allowed to state his reasons why he had not made out such an affidavit, but upon objection by plaintiff's counsel he was not allowed to do so.

he was "senior in neurology at St. Luke's Hospital" and an
associate professor at the University of Illinois; that on Sunday
December 27 [28], 1937, the day before the death of Kroposki, he
was called as a physician to the Kroposki home about two o'clock
p.m. and found Kroposki in bed in the front room upstairs; that
he made an examination of him at that time, and that present during
the examination was one of these doctors at Kroposki's, "Kroposki's
sister, and I think his mother;" that after he had talked with
Kroposki for a few minutes, "or tried to," he "carried out a
neurological examination on him, that is, a physical examination
with special reference to any disturbance of his nervous system;"
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system carries out, such as pupillary reactions, the presence or
absence of muscular power in various parts of the body, presence
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stated that he did not make out a physician's affidavit for admission
to the psychopathic hospital, he asked to be allowed to state his
reasons why he had not made out such an affidavit, but upon objection
by plaintiff's counsel he was not allowed to do so.

Joseph Kropacek, a brother of the deceased, testified that at the time of the death of the deceased he lived at 3135 Normal avenue, where the witness also lived; that William was thirty-one years of age, single, and a Catholic; that he had been ailing for several years; that his sight and hearing were good; that he was about five feet, eleven inches in height and weighed about 160 pounds. "Q. What did you observe as to his mental condition * * * just prior to his death. A. Well, he went to Omaha. I noticed it after he came back from Omaha;" that after he came back "I couldn't observe much of anything;" that he told the witness "he had been overworked and was awfully nervous and could not sleep nights; that "he hadn't slept for about a week or two;" that the last time he saw his brother alive was Sunday afternoon at the Peoples Hospital; that William had not been in any institution for mental disorders; that the doctor suggested that William be taken to "Mercyville Sanitarium." "Q. Now, what was this condition you observed that caused you to call in Dr. MacKay and Dr. Gilbert? A. Dr. Gilbert suggested Dr. MacKay. He didn't know what was wrong at the time. * * * Q. * * * What happened on that night [24th]? A. Well, he did ask me for a gun. That is what he asked for. Q. Yes. A. But, if he had any intentions of using it, he had it himself. Q. Yes. Now, did you have to use restraint on him during this Sunday to quiet him down? A. Well, he tried to run out of the house several times and I called my brother-in-law from across the street to take him back in the house. I did mention that at the Peoples Hospital, that he will try to run out of the place, and told them to watch him." Upon cross-examination by plaintiff's counsel the witness testified that at the time that William asked for a gun he had the gun himself in his drawer and he had the key in his pocket; that on that same day the witness left the house and was gone for two hours, during which time William was alone in the house; that in the house there was also a rifle that William used when he went hunting; that the witness did not

Joseph Kropacsek, a brother of the deceased, testified

that at the time of the death of the deceased he lived at 2137

Central Avenue, where the witness also lived; that William was

thirty-one years of age, single, and a Catholic; that he had been

sailing for several years; that his right and hearing were good; that

he was about five feet, eleven inches in height and weighed about

150 pounds. Q. What did you observe as to his mental condition

*** Just prior to his death. A. Well, he went to Graham. I

noticed it after he came back from Omaha; that after he came back

"I couldn't observe much of anything;" that he told the witness

"he had been overworked and was terribly nervous and could not sleep

night; that he didn't sleep for about a week or two; that the

last time he saw his brother alive was Sunday afternoon at the

Peoples Hospital; that William had not been in any institution

for mental disorders; that the doctor suggested that William be

taken to "Crazyville institution." Q. Now, what was the condition

you observed that caused you to call in Dr. Kropacsek and Dr. Kropacsek

A. Dr. Kropacsek suggested Dr. Kropacsek. He didn't know what was

wrong at the time. Q. Now, what happened on that night

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to run out of the house several times and I called my brother-in-law

from across the street to take him back in the house. I did mention

that at the Peoples Hospital, and he will be put out of the

place, and told them to watch him." Upon cross-examination by

EXHIBIT 1. Admitted the witness testified that at the time that

William asked for a gun he had the gun himself in his drawer and

he had the key to his pocket; that on that same day the witness

left the house and was gone for two hours, during which time William

was alone in the house; that in the house there was also a rifle

that William used when he went hunting; that the witness did not

think much of the statement made by his brother regarding a gun, as he figured that if William wanted the gun he could have got it himself and could have used it at any time he wanted it; that William "had a priest" on the Thursday afternoon before he died; that the witness did not notice anything unusual "about his head" on December 26; that William was satisfied to be at the hospital, that he called them up about seven o'clock and said "we should not worry, that he had two nurses, two blonde nurses taking care of him."

Defendant offered in evidence certain photographs of the Peoples Hospital. These photographs and certain other evidence show that the hospital is a four-story building that faces north on Cermak road, or 22d street; that on the third floor is a corridor which opens out onto a porch that covers the entire east end of the building; that the porch is about eight feet in width and has a floor of corrugated or rough steel "with notches in it;" that it has a fire escape at the south end and an archway window at the north end; that the bottom ledge of the archway window is three feet, three or four inches, from the floor of the porch; that the concrete block which forms the bottom of the archway window ledge is fourteen inches across; that the distance from the bottom of the archway window to the sidewalk below is thirty feet, two inches; and that the width of the sidewalk directly opposite the archway window, on the 22d street or Cermak road side, is sixteen feet, four or five inches.

A police officer who responded to a call a few minutes after seven o'clock in the morning, testified, inter alia, that he observed the condition of the sidewalk upon his arrival at the scene of the death and found that the sidewalk had been washed off with water at a point opposite the window opening and he saw there some dark red stains which were not all washed off; that the distance between the point where he observed the blood and the wall of the building was about fourteen feet; that the body of the deceased had been removed from the sidewalk before the witness arrived; that

think much of the statement made by his brother regarding a gun, as he figured that if William wanted the gun he would have got it himself and would have used it at any time he wanted it; that William "had a premonition" on the Thursday afternoon before he died; that the witness did not notice anything unusual "about his head" on December 26; that William was satisfied to be at the hospital, that he called them up about seven o'clock and said "we should not worry, that he had two nurses, two blonde nurses taking care of him."

Defendant offered in evidence certain photographs of the Peoples Hospital. These photographs and certain other evidence show that the hospital is a four-story building that faces north on German road, or 2nd street; that on the third floor is a corridor which opens out onto a porch that covers the entire east end of the building; that the porch is about eight feet in width and has a floor of corrugated or rough steel "with notches in it;" that it has a fire escape at the south end and an airway window at the north end; that the bottom ledge of the airway window is three feet, three or four inches, from the floor of the porch; that the concrete block which forms the bottom of the airway window ledge is fourteen inches across; that the distance from the bottom of the airway window to the sidewalk below is thirty feet, two inches; and that the width of the sidewalk directly opposite the airway window, on the 2nd street or German road side, is sixteen feet, four or five inches. A police officer who responded to a call a few minutes after seven o'clock in the morning, testified, under oath, that he observed the condition of the sidewalk upon his arrival at the scene of the death and found that the sidewalk had been washed off with water at a point opposite the window opening and he saw there some dark red stains which were not all washed off; that the distance between the point where he observed the blood and the wall of the building was about fourteen feet; that the body of the deceased had been removed from the sidewalk before the witness arrived; that

the janitor of the hospital showed him where he found the body, it was "where this water was lying."

The superintendent of nurses at the hospital, Jean Adams, testified that she resided at the hospital; that she admitted Kropacek to the hospital; that his brother Joseph brought him there; that William was assigned to room 304 on the third floor, which room is in the middle of the hospital; that she talked with the patient at the time of his admission; that she thought he looked just like any other patient; that after the patient asked her, "Would it be any trouble to get a priest for him," she got a priest for him during the afternoon; that the priest left and later in the evening she had a talk with Kropacek in his bedroom and ordered an enema for him; that after he had been given the enema he felt better and was quite cheerful, but stated that he did not think that he was going to sleep that night, and after supper she "ordered a sedative for him by doctor's orders. He got two allonal tablets;" that Kropacek "had a quiet evening," as far as she knew; that she heard him say over the telephone that he liked the nurses and that they were nice to him; that she saw him last about 10:30 o'clock at night; that she saw him next on the morning of December 27, at which time he was dead; that she observed his head was all smashed in. Upon cross-examination the witness testified that there was a fire escape on the porch and that the words "Fire Escape" appeared on the door leading to the porch; that the brother of the deceased requested that he be assigned general duty; that there were two or three toilets on the third floor, one directly opposite the patient's room; that there was one window in the patient's room and she thought that it was shut at all times.

The houseman of the hospital, Peter Krolikowski, testified that about seven o'clock Monday morning, December 27, 1937, the witness, after hearing "hollering," ran outside and looked on the walk and seen the patient lying there;" that at the east end of the hospital on the third floor there is a porch; "that after you step

the janitor of the hospital showed him where he found the body, it was "where this water was lying."

The superintendent of nurses at the hospital, Jean Adams,

testified that she recalled that the deceased was admitted to the hospital; that his brother Joseph brought him there; that William was assigned to room 304 on the third floor, which room is in the middle of the hospital; that she talked with the patient at the time of his admission; that she thought he looked just like any other patient; that after the patient asked her, "Would it be any trouble to get a priest for him," she got a priest for him during the afternoon; that the priest left and later in the evening she had a talk with Kroposch in his bedroom and ordered an enema for him; that after he had been given the enema he felt better and was quite cheerful, but stated that he did not think that he was going to sleep that night, and after supper she "ordered a negative for him by doctor's orders. He got two almonai tablets;" that Kroposch "had a quiet evening," as far as she knew; that she heard him say over the telephone that he liked the nurses and that they were nice to him; that she saw him last about 10:30 o'clock at night; that she saw him next on the morning of December 27, at which time he was dead; that she observed his head was all swathed in. Upon cross-examination she stated further that there was a time when on the porch and that the words "The Escape" appeared on the door leading to the porch; that the brother of the deceased requested that he be assigned general duty; that there were two or three toilets on the third floor, one directly opposite the patient's room; that there was one window in the patient's room and she thought that it was shut at all times.

The houseman of the hospital, Peter Krollowski, testified that about seven o'clock Monday morning, December 27, 1917, the witness, after hearing "hollering," ran outside and looked on the sidewalk and near the "hollering" and saw the body of the deceased on the third floor there is a porch; that after you step

out on the porch and turn to your left you walk right over toward 22d street and come to a ledge or archway;" that the distance from the door to the archway was fifteen feet, eight inches; that the distance from the porch floor to the bottom of the window ledge is three feet, two inches, and the distance across that window ledge is one foot, three inches; that "the distance straight down according to my measurements was thirty feet, one inch;" that the distance from the side of the wall of the hospital to the curb is sixteen feet, five inches; that when he saw the body of the deceased it was "laying on the walk. It was fourteen feet two inches north of the hospital. It was about in the center of the archway;" that when he reached the body he saw that the deceased "had on a night gown" that "was pulled all the way up to his neck. He was all exposed," and the head was facing west; that the witness measured the distance from the body to the curb and found it was two feet, two inches; that there was no water on the sidewalk when he picked the patient up and the pavement was dry; that after they brought the body of the patient into the hospital the witness washed that part of the sidewalk where he had found the body.

Defendant contends: "Under the terms of the double indemnity clause which provides that the defendant shall not be liable for death resulting from 'self-destruction, whether sane or insane,' the law is well established in Illinois that the defendant is not liable if the insured died from self-destruction either as the intentional act of a sane person or the act of an insane person motivated by some insane impulse or totally unconscious of the nature and character of his act. Under such a clause the degree of sanity or insanity does not preclude the defense of self-destruction." This statement of the law does not seem to be disputed by plaintiff. In any event, it correctly states the law of this State.

Defendant strenuously contends that under the facts of the case the only reasonable hypothesis is that the insured, whether he was sane or insane, came to his death by self-destruction, and that the trial court erred in failing to direct a verdict for defendant

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Defendant strenuously contends that under the facts of the case the only reasonable hypothesis is that the insured, whether he was sane or insane, came to his death by self-destruction, and that the trial court erred in failing to direct a verdict for defendant.

at the close of all the evidence. While this contention is strenuously and ably argued, we are satisfied that it is our duty under the law to hold against it. "A motion to instruct the jury to find for the defendant is in the nature of a demurrer to the evidence, and that rule is that the evidence so demurred to, in its aspect most favorable to the plaintiff, together with all reasonable inferences arising therefrom, must be taken most strongly in favor of the plaintiff. The evidence is not weighed, and all contradictory evidence or explanatory circumstances must be rejected. The question presented on such motion is whether there is any evidence fairly tending to prove the plaintiff's declaration. In reviewing the action of the court of which complaint is made we do not weigh the evidence, - we can look only at that which is favorable to appellant. Yess v. Yess, 255 Ill. 414; McCune v. Reynolds, 288 id. 188; Lloyd v. Rush, 273 id. 439." (Hunter v. Troup, 315 Ill. 293, 296, 297. *Italics ours.*) See, also, Mahan v. Richardson, 284 Ill. App. 493, 495; Thomason v. Chicago Motor Coach Co., 292 Ill. App. 104, 110; Wolever v. Curtiss Candy Co., 293 Ill. 586, 597. In the light of this rule of law, we are satisfied that it is our duty to hold that the trial court did not commit reversible error in refusing to instruct the jury to find for defendant at the close of all the evidence.

Defendant contends that, in any event, the verdict of the jury is manifestly against the weight of the evidence and therefore the trial court erred in denying defendant's motion for a new trial. This contention, in our judgment, is clearly/^ameritorious one. As this case will probably be tried again we refrain from analyzing and commenting upon the facts and circumstances in evidence. Counsel for plaintiff, in support of their argument that Kropacek's death was accidental and that the verdict of the jury is not manifestly against the weight of the evidence, contend, in this court, that the predominating factor in producing the insured's death was probably the two allonal tablets that the nurse gave Kropacek.

Plaintiff argues that "there is no evidence that the insured ever took Allonal or any like drug before, and we submit that the purpose and the initial effect thereof was to induce sleep, but that under the influence of this drug, he not having taken the same before, that the further effect of the same would be to impair the normal functions of the insured's brain and muscle impulses, so that he could not concentrate enough to commit suicide which could reasonably have been the predominating factor that the insured's death was accidental, and could reasonably have brought about a misstep, misadventure or accident resulting in insured's death, as found by the jury and sustained by the court." Plaintiff further argues that "the brain impulses, and the muscle impulses of the insured were interrupted, and that the insured could have functioned by 'sub-conscious mind,' due to the effects of this drug, both before and immediately leading up to the acts and occurrence of his death." The only evidence in respect to the allonal tablets is the testimony of the head nurse, Jean Adams, that after Kropacek had told her that he did not think he was going to go to sleep that night she, "by his doctor's orders," ordered as a sedative for him two allonal tablets. Plaintiff's able counsel thought so little of this evidence when it was given that he did not cross-examine the witness in reference to the allonal tablets. There is not a word of evidence in the record that tends to support plaintiff's argument as to the nature and effect of these tablets. In plaintiff's brief, counsel, in support of the argument that we would have a right to conclude that the cause of the death of the insured was due to the taking of the allonal tablets, have not hesitated to go outside of the record. If the two allonal tablets could have had the effect on the deceased that plaintiff now argues, there was a proper way to show that fact.

The judgment of the Municipal court of Chicago is reversed and the cause is remanded.

JUDGMENT REVERSED AND CAUSE REMANDED.

Friend, P. J., and Sullivan, J., concur.

Plaintiff argues that "there is no evidence that the insured ever took Alional or any like drug before, and we submit that the purpose and the initial effect thereof was to induce sleep, but that under the influence of this drug, he not having taken the same before, that the further effect of the same would be to impair the normal functions of the insured's brain and muscle impulses, so that he could not concentrate enough to commit suicide which could reasonably have been the predominating factor that the insured's death was accidental, and could reasonably have brought about a misadventure or accident resulting in insured's death, as found by the jury and sustained by the court." Plaintiff further argues that "the victim himself, and the medical examiner of the insured were interested, and that the insured could have functioned by 'self-control' due to the effects of this drug, both before and immediately leading up to the acts and occurrence of his death."

The only evidence in respect to the Alional tablets is the testimony of the head nurse, Jean Adams, that after Kroposch had told her that he did not think he was going to go to sleep that night and, "by his doctor's orders," ordered as a sedative for him two Alional tablets, Plaintiff's able counsel thought so little of this evidence when it was given that he did not cross-examine the witness in reference to the Alional tablets. There is not a word of evidence in the record that tends to support Plaintiff's argument as to the nature and effect of these tablets. In Plaintiff's brief, counsel, in support of the argument that he would have a right to recover that the cause of the death of the insured was due to the action of the Alional tablets, have not limited to the outside of the record. If the two Alional tablets could have had the effect on the deceased that Plaintiff now argues, there was a proper way to show that fact.

The judgment of the Municipal court of Chicago is reversed and the cause is remanded.

JUDGMENT REVERSED AND CAUSE REMANDED.

Friend, P. J. and Sullivan, J., concur.

40855

PEOPLE OF THE STATE OF ILLINOIS
ex rel. Oscar Nelson, as Auditor
of Public Accounts of the State
of Illinois,

v.

UNION STATE BANK OF SOUTH CHICAGO
et al.

JULIUS F. SMIETANKA, as Trustee,
(Intervening Petitioner)
Appellee,

v.

CHARLES H. ALBERS, Receiver of
the Union State Bank of South
Chicago, (Respondent)
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

307 I.A. 382

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

A liquidation suit of the Union State Bank of South Chicago was pending in the Circuit court of Cook county. An intervening petition was filed in said suit by Julius F. Smietanka, as trustee under three certain trust deeds, which petition asked the court to direct Charles H. Albers, receiver of said bank, to pay to said petitioner certain moneys claimed to be due the petitioner for court costs, expenses, attorneys' fees and master's fees incurred or expended by the petitioner as plaintiff in the foreclosures of the three trust deeds, which secure three series of notes, a portion of each series being owned or held by said receiver. The receiver filed an answer denying that the petitioner was entitled to payment from the assets of the bank. After hearing evidence the trial court on March 28, 1939, entered an order directing the receiver to pay the amounts asked for by the petitioner. The order further provided that the receiver, upon the payment of said amounts, "shall be and he is subrogated to the rights and privileges of the said Julius F. Smietanka, as trustee, plaintiff, acquired by him under the

PEOPLE OF THE STATE OF ILLINOIS
ex rel. Oscar Nelson, as Auditor
of Public Accounts of the State
of Illinois,

v.

UNION STATE BANK OF SOUTH CHICAGO
et al.

JULIUS F. BRINKMANN, as Trustee,
(Intervening Petitioner),
Appellant,

v.

CHARLES H. ALPERT, Receiver of
the Union State Bank of South
Chicago, (Respondent),
Appellee.

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Brinkmann, as trustee, plaintiff, acquired by him under the

respective decrees entered in said cases, to a first and prior lien for such advances for said legal services, costs, and Master's fees." The receiver of the bank appeals from the order.

The verified intervening petition recites:

"1. That the Union State Bank of South Chicago, an Illinois banking corporation, suspended business on September 18, 1931, and because thereof the above entitled suit was started and Frank M. McKey was duly appointed Receiver of the assets of said bank.

"2. That said bank negotiated from time to time loans secured by mortgages on real estate and the borrowers conveyed their equities in the form of a trust deed to Julius F. Smietanka, Trustee, the petitioner herein, and Courtney R. Merrill, Successor in Trust; that the indebtedness was evidenced by a single note for the amount thereof or a series of notes with interest coupons attached; that in the course of business such notes were sold to persons desiring to make real estate loan investments.

"3. That among such loans so negotiated by said bank were the following:

"A. John Sinila and Alexandra Sinila, his wife on the 27th day of November, 1928, for the sum of \$17,000.00, evidenced by eight (8) principal promissory notes and secured by a trust deed on the property known as 9800 Escanaba Avenue, and legally described as:
[Here follows legal description]

"B. Wellington B. Mitchell and Mary Mitchell, his wife, on the 25th day of March, 1925, for the sum of \$6500.00 evidenced by seven (7) principal promissory notes and secured by a trust deed on the property known as 9710 Avenue J and legally described as:
[Here follows legal description]

"C. George Starceovich on the 18th day of September, 1929, for the sum of \$4500.00 evidenced by two (2) principal promissory notes and secured by a trust deed on the property known as 10400 Avenue N and legally described as:
[Here follows legal description]

"4. That there came into the possession of the said Frank M. McKey, as such Receiver, as part of the assets of said defunct bank, of the notes described in the foregoing paragraph, the following:

respective decrees entered in said cases, to a first and prior lien for such advances for said legal services, costs, and Master's fees."

The receiver of the bank appeals from the order.

The verified intervening petition recites:

"1. That the Union State Bank of South Chicago, an Illinois banking corporation, organized business on September 18, 1911, and

because thereof the above entitled suit was started and Frank M. McKay was duly appointed Receiver of the assets of said bank.

"2. That said bank negotiated from time to time loans

secured by mortgages on real estate and the borrowers conveyed their equities in the form of a trust deed to Julius W. Whitstam, Trustee,

The petitioner herein, and Courtney R. Merrill, Successor in Trust; that the indebtedness was evidenced by a single note for the amount

thereof or a series of notes with interest coupons attached; that in the course of business such notes were sold to persons desiring

to make real estate loan investments.

"3. That among such loans so negotiated by said bank

were the following:

"a. Loan to Julia and Alexander Smith, his wife or her, the day of November, 1925, for the sum of \$10,000.00, evidenced by deed (1) recorded in the County of Cook, Illinois, and secured by a trust deed on the property known as 9800 Wescott Avenue, and legally described as follows (here follows legal description)

"b. Loan to W. Merrill and Courtney R. Merrill, his wife, on the 25th day of March, 1925, for the sum of \$10,000.00, evidenced by deed (2) recorded in the County of Cook, Illinois, and secured by a trust deed on the property known as 9710 Avenue 7 and legally described as follows (here follows legal description)

"c. George Stevenson on the 18th day of September, 1925, for the sum of \$4,000.00 evidenced by deed (3) recorded in the County of Cook, Illinois, and secured by a trust deed on the property known as 10000 Avenue 7 and legally described as follows (here follows legal description)

"4. That there were in the possession of the said

Frank M. McKay, as such Receiver, as part of the assets of said bank, of the notes described in the foregoing paragraph, the following:

| | |
|-------------------------|-----------|
| "John Sinila | \$7000.00 |
| "Wellington B. Mitchell | 3000.00 |
| "George Starceovich | 1400.00 |

"5. Because of the default in the payment of said notes, the said Frank M. McKey, Receiver, made a request upon your petitioner, as such Trustee so designated in said trust deeds, to file foreclosure proceedings in each instance, pursuant to the powers vested in said Trustee by the terms of said Trust Indentures, and accordingly petitioner hired counsel to proceed in accordance with such direction, and suits were started and entitled as follows:

"Julius F. Smietanka, Trustee vs.
John Sinila, et al., Circuit court
case numbered B-239060;

"Julius F. Smietanka, Trustee vs.
Wellington B. Mitchell, et al.,
Circuit Court case numbered B-235663;

"Julius F. Smietanka, Trustee vs.
George Starceovich, et al., Circuit
Court case numbered B-238341."

"6. That said proceedings terminated in a decree and pursuant to the provisions thereof on the respective days of sale by the Masters in Chancery to whom said causes were referred, there being no cash offers at said sales, Julius F. Smietanka bid the amount of the indebtedness due and owing to him as such plaintiff Trustee.

"7. That reports of sale submitted by the Masters in Chancery were in each instance approved by the Court and certificates of sale were issued by said Masters of the properties so sold to the said Julius F. Smietanka, Trustee.

"8. Petitioner further represents that in order to bring this litigation and to pursue it to a conclusion, it became necessary for him as such Trustee to hire counsel, to advance costs and obligate himself for Master's fees and charges, none of which have been paid to him.

"9. That during the pendency of the receivership proceedings a change of Receivers was effected from time to time and lately Charles H. Albers is acting as such Receiver of the said Union State Bank of South Chicago; that the said Receiver was well-acquainted with the

\$7,500.00
\$5,000.00
\$4,000.00

"John Smith
"William B. Mitchell
"George Starovick

"5. Because of the delay in the payment of said notes, the said Frank M. McKay, Receiver, made a request upon your petition, as such Trustee so designated in said Trust Deeds, to file proceedings in each instance, pursuant to the power vested in said Trustee by the terms of said Trust Indentures, and accordingly petition filed counsel to proceed in accordance with such direction, and suits were started and entitled as follows:

"Julius F. Smietanka, Trustee vs.
John Smith, et al., Circuit Court
case numbered B-23900;

"Julius F. Smietanka, Trustee vs.
William B. Mitchell, et al.,
Circuit Court case numbered B-23903;

"Julius F. Smietanka, Trustee vs.
George Starovick, et al., Circuit
Court case numbered B-23941."

"6. That said proceedings terminated in a decree and pursuant to the provisions thereof on the respective days of sale by the Masters in Chancery to whom said causes were referred, there being no cash offers at said sales, Julius F. Smietanka bid the amount of the indebtedness due and owing to him as such plaintiff Trustee.

"7. That reports of sale submitted by the Masters in Chancery were in each instance approved by the Court and certificates of sale were issued by said Masters of the properties so sold to the said Julius F. Smietanka, Trustee.

"8. Petitioner further represents that in order to bring this litigation and to pursue it to a conclusion, it became necessary for him as such Trustee to advance costs and obligate himself for said costs, fees and charges, none of which have been paid to him.

"9. That during the pendency of the receivership proceedings a change of Receiver was effected from time to time and lately Charles E. Albers is acting as such Receiver of the said Union State Bank of South Chicago; that the said Receiver was well-acquainted with the

steps being taken in said foreclosures and from time to time informed by this petitioner of progress being made.

"10. That statements of the services performed and disbursements made incident to said litigation as aforesaid have been submitted to the said Receiver on several occasions since October 8, 1937, with no specific objection to either of them, copies of which are hereto attached and made a part hereof.

"11. That said charges, with the exception of those made for Trustee's fees, have been approved upon proper presentation to the Court.

"12. That the petitioner himself did not perform any of the legal services, but hired counsel therefor and is obliged to pay the same; that such are fair, reasonable and the ordinary fees customarily recognized in Chicago as fair and reasonable for like services performed.

"13. That likewise the charges made for the fees of the Trustee are fair and reasonable and the customary charges made for services similarly performed as outlined herein and otherwise rendered without specifying the same in detail.

"14. Petitioner further alleges that there is due him as such Trustee plaintiff in said cases the following amounts:

| | |
|------------------------------|-----------|
| "Smietanka vs. Sinila - | \$1770.90 |
| "Smietanka vs. Mitchell - | 854.15 |
| "Smietanka vs. Starceovich - | 523.51 |

as of the dates mentioned in the attached statements, reference to each is hereby made for particulars of the services rendered.

"Wherefore, petitioner prays judgment that the said Charles H. Albers, Receiver of Union State Bank of South Chicago, pay unto the petitioner the respective amounts herein set forth; that said Receiver be ordered to make answer within a short day to be fixed by the Court, and such other and further relief as to the Court may seem meet."

Attached to the petition were statements that the costs, cash advances, attorneys' fees and master's fees expended or incurred by

steps being taken in said proceedings from time to time informed by this petitioner of progress being made.

"10. That statements of the services performed and disbursements made incident to said litigation as aforesaid have been submitted to the said Receiver on several occasions since October 8, 1937, with no specific objection to either of them, copies of which are hereto attached and made a part hereof.

"11. That said charges, with the exception of those made for Trustee's fees, have been approved upon proper presentation to the Court.

"12. That the petitioner himself did not perform any of the legal services, but hired counsel therefor and is obliged to pay the same; that such are fair, reasonable and the ordinary fees customarily recognized in Chicago as fair and reasonable for like services rendered.

"13. That likewise the charges made for the fees of the Trustee are fair and reasonable and the customary charges made for services similarly performed as outlined herein and elsewhere rendered without specifying the same in detail.

"14. Petitioner further alleges that there is due him as such Trustee plaintiff in said cases the following amounts:

| | | |
|------------|---|------------------------|
| \$1,750.00 | - | "Gustafson vs. Shultz" |
| 500.00 | - | "Gustafson vs. Shultz" |
| 500.00 | - | "Gustafson vs. Shultz" |

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"Wherefore, petitioner prays judgment that the said Charles H. Albers, Receiver of Union State Bank of South Chicago, pay unto the petitioner the respective amounts herein set forth; that said Receiver be ordered to make answer within a short day to be fixed by the Court, and such other and further relief as to the Court may seem meet."

Attached to the petition were statements that the costs, and advances, attorneys' fees and master's fees expended or incurred by

the trustee in each case are as follows: Smietanka, Trustee v. Sinila et al., \$1,770.90; Smietanka, Trustee v. Mitchell, \$854.15; Smietanka, Trustee v. Starcevich et al., \$523.51.

The verified answer of the respondent states, inter alia:

"This respondent alleges on information and belief that none of his predecessors in office ever employed the firm of Smietanka, Conlon and Knaus to file the foreclosure suits as set out in said intervening petition and denies that he, as receiver of the Union State Bank of South Chicago, ever employed said firm of Smietanka, Conlon and Knaus to file the said foreclosure suits and avers that said Julius F. Smietanka caused proceedings to be instituted without advising this respondent of so doing and said respondent neither admits nor denies that any notice of the filing of said proceedings and any demand for the filing of said proceedings was given or was made upon his predecessors in office and calls for strict proof of any notice or of any demand. * * * Avers that he at no time authorized Julius F. Smietanka, as trustee, to institute the aforesaid foreclosure proceedings, that said Julius F. Smietanka instituted said proceedings by virtue of the powers granted to said Julius F. Smietanka in the respective Trust Deeds; that under the terms of said Trust Deeds the charges of the attorneys for said trustee became a lien on the real estate foreclosed and that said firm of Smietanka, Conlon and Knaus, under the terms of the respective trust deeds are obligated to look to the real estate conveyed by said trust deeds for their security for their fees, as attorneys for said trustee."

Union State Bank of South Chicago was closed in September, 1931, by the auditor of public accounts of the State of Illinois. Frank M. McKey was appointed receiver of the bank and as such receiver he had in his possession the following: A total of \$7000 of mortgage notes signed by John Sinila and his wife, which notes were part of an issue of \$17,000 secured by a trust deed to Julius F. Smietanka, as trustee, conveying certain real property. A total of \$3,000 of mortgage notes signed ^{by} Wellington D. Mitchell and his wife, which

The trustees in each case are as follows: Shelton v. Shellen,
of the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 30th, 31st, 32nd, 33rd, 34th, 35th, 36th, 37th, 38th, 39th, 40th, 41st, 42nd, 43rd, 44th, 45th, 46th, 47th, 48th, 49th, 50th, 51st, 52nd, 53rd, 54th, 55th, 56th, 57th, 58th, 59th, 60th, 61st, 62nd, 63rd, 64th, 65th, 66th, 67th, 68th, 69th, 70th, 71st, 72nd, 73rd, 74th, 75th, 76th, 77th, 78th, 79th, 80th, 81st, 82nd, 83rd, 84th, 85th, 86th, 87th, 88th, 89th, 90th, 91st, 92nd, 93rd, 94th, 95th, 96th, 97th, 98th, 99th, 100th, 101st, 102nd, 103rd, 104th, 105th, 106th, 107th, 108th, 109th, 110th, 111th, 112th, 113th, 114th, 115th, 116th, 117th, 118th, 119th, 120th, 121st, 122nd, 123rd, 124th, 125th, 126th, 127th, 128th, 129th, 130th, 131st, 132nd, 133rd, 134th, 135th, 136th, 137th, 138th, 139th, 140th, 141st, 142nd, 143rd, 144th, 145th, 146th, 147th, 148th, 149th, 150th, 151st, 152nd, 153rd, 154th, 155th, 156th, 157th, 158th, 159th, 160th, 161st, 162nd, 163rd, 164th, 165th, 166th, 167th, 168th, 169th, 170th, 171st, 172nd, 173rd, 174th, 175th, 176th, 177th, 178th, 179th, 180th, 181st, 182nd, 183rd, 184th, 185th, 186th, 187th, 188th, 189th, 190th, 191st, 192nd, 193rd, 194th, 195th, 196th, 197th, 198th, 199th, 200th, 201st, 202nd, 203rd, 204th, 205th, 206th, 207th, 208th, 209th, 210th, 211th, 212th, 213th, 214th, 215th, 216th, 217th, 218th, 219th, 220th, 221st, 222nd, 223rd, 224th, 225th, 226th, 227th, 228th, 229th, 230th, 231st, 232nd, 233rd, 234th, 235th, 236th, 237th, 238th, 239th, 240th, 241st, 242nd, 243rd, 244th, 245th, 246th, 247th, 248th, 249th, 250th, 251st, 252nd, 253rd, 254th, 255th, 256th, 257th, 258th, 259th, 260th, 261st, 262nd, 263rd, 264th, 265th, 266th, 267th, 268th, 269th, 270th, 271st, 272nd, 273rd, 274th, 275th, 276th, 277th, 278th, 279th, 280th, 281st, 282nd, 283rd, 284th, 285th, 286th, 287th, 288th, 289th, 290th, 291st, 292nd, 293rd, 294th, 295th, 296th, 297th, 298th, 299th, 300th, 301st, 302nd, 303rd, 304th, 305th, 306th, 307th, 308th, 309th, 310th, 311th, 312th, 313th, 314th, 315th, 316th, 317th, 318th, 319th, 320th, 321st, 322nd, 323rd, 324th, 325th, 326th, 327th, 328th, 329th, 330th, 331st, 332nd, 333rd, 334th, 335th, 336th, 337th, 338th, 339th, 340th, 341st, 342nd, 343rd, 344th, 345th, 346th, 347th, 348th, 349th, 350th, 351st, 352nd, 353rd, 354th, 355th, 356th, 357th, 358th, 359th, 360th, 361st, 362nd, 363rd, 364th, 365th, 366th, 367th, 368th, 369th, 370th, 371st, 372nd, 373rd, 374th, 375th, 376th, 377th, 378th, 379th, 380th, 381st, 382nd, 383rd, 384th, 385th, 386th, 387th, 388th, 389th, 390th, 391st, 392nd, 393rd, 394th, 395th, 396th, 397th, 398th, 399th, 400th, 401st, 402nd, 403rd, 404th, 405th, 406th, 407th, 408th, 409th, 410th, 411th, 412th, 413th, 414th, 415th, 416th, 417th, 418th, 419th, 420th, 421st, 422nd, 423rd, 424th, 425th, 426th, 427th, 428th, 429th, 430th, 431st, 432nd, 433rd, 434th, 435th, 436th, 437th, 438th, 439th, 440th, 441st, 442nd, 443rd, 444th, 445th, 446th, 447th, 448th, 449th, 450th, 451st, 452nd, 453rd, 454th, 455th, 456th, 457th, 458th, 459th, 460th, 461st, 462nd, 463rd, 464th, 465th, 466th, 467th, 468th, 469th, 470th, 471st, 472nd, 473rd, 474th, 475th, 476th, 477th, 478th, 479th, 480th, 481st, 482nd, 483rd, 484th, 485th, 486th, 487th, 488th, 489th, 490th, 491st, 492nd, 493rd, 494th, 495th, 496th, 497th, 498th, 499th, 500th, 501st, 502nd, 503rd, 504th, 505th, 506th, 507th, 508th, 509th, 510th, 511th, 512th, 513th, 514th, 515th, 516th, 517th, 518th, 519th, 520th, 521st, 522nd, 523rd, 524th, 525th, 526th, 527th, 528th, 529th, 530th, 531st, 532nd, 533rd, 534th, 535th, 536th, 537th, 538th, 539th, 540th, 541st, 542nd, 543rd, 544th, 545th, 546th, 547th, 548th, 549th, 550th, 551st, 552nd, 553rd, 554th, 555th, 556th, 557th, 558th, 559th, 560th, 561st, 562nd, 563rd, 564th, 565th, 566th, 567th, 568th, 569th, 570th, 571st, 572nd, 573rd, 574th, 575th, 576th, 577th, 578th, 579th, 580th, 581st, 582nd, 583rd, 584th, 585th, 586th, 587th, 588th, 589th, 590th, 591st, 592nd, 593rd, 594th, 595th, 596th, 597th, 598th, 599th, 600th, 601st, 602nd, 603rd, 604th, 605th, 606th, 607th, 608th, 609th, 610th, 611th, 612th, 613th, 614th, 615th, 616th, 617th, 618th, 619th, 620th, 621st, 622nd, 623rd, 624th, 625th, 626th, 627th, 628th, 629th, 630th, 631st, 632nd, 633rd, 634th, 635th, 636th, 637th, 638th, 639th, 640th, 641st, 642nd, 643rd, 644th, 645th, 646th, 647th, 648th, 649th, 650th, 651st, 652nd, 653rd, 654th, 655th, 656th, 657th, 658th, 659th, 660th, 661st, 662nd, 663rd, 664th, 665th, 666th, 667th, 668th, 669th, 670th, 671st, 672nd, 673rd, 674th, 675th, 676th, 677th, 678th, 679th, 680th, 681st, 682nd, 683rd, 684th, 685th, 686th, 687th, 688th, 689th, 690th, 691st, 692nd, 693rd, 694th, 695th, 696th,

The verified answer to the respondent states, Inter Alia:

"This respondent alleges no illegal information and belief that

none of his predecessors in office ever employed the firm of

Antietam, Condon and Means to file the foregoing with us set out

in said intervening petition and denies that he, as receiver of the

Union State Bank of South Chicago, ever employed said time

Stefania. Conlon and Knapp to file the said foregoing suit and

every that said Julius T. Rosenberg caused proceedings to be instituted

without advising this respondent of so doing and said respondent neither

admits nor denies that any notice of the filing of said proceedings

and any demand for the filing of said proceedings was given or was

made upon his predecessors in office and calls for strict proof to

any notice or of any demand. * * * Avers that he does not authorize any

Julius F. Sabinas, as trustee, to institute the foregoing foreclosure

proceedings, that said Julia T. McIntosh instituted said proceedings.

by virtue of the powers granted to said Julius W. Sinfankin in the

respective Trust Deeds; that under the terms of said Trust Deeds the

charges of the attorneys for said trustee became a lien on the real

estate foreclosed and that said firm of Architects, Conlon and Kears,

under the terms of the respective trust deeds are obligated to look

to the real estate conveyed by said trust deeds for their security

for their fees, as attorneys for said trustee."

U.S. DEPARTMENT OF AGRICULTURE

by the auditor of public accounts of the State of Illinois. True.

2. Bhatia was appointed receiver of the bank and as such receiver is

had in his possession the following: A total of \$7000 of mortgage

notes signed by John Smith and his wife, which notes were part of

and a lot of good things to do for me.

as trustee, conveying certain real property.

Worthage notes signed Wellington B. Mitchell and his wife, which

notes were part of an issue of \$6,500 secured by trust deed to Julius F. Smietanka, as trustee, conveying certain real property. A total of \$1,400 of mortgage notes signed by George Starceovich, which notes were part of an issue of \$4,500 secured by trust deed to Julius F. Smietanka, as trustee, conveying certain real property. Mr. Smietanka was an organizer of the bank and at the time it went into receivership he was an officer and director of it. Defaults were made in the payment of some of the notes of the above issues and Smietanka, as trustee, caused the three foreclosure suits in question to be commenced. Ryan, Condon & Livingston, who were also attorneys for the receiver of the bank, filed the said suits for the trustee. During the pendency of the foreclosure suits Ryan, Condon & Livingston withdrew as attorneys for the trustee and the firm of Smietanka, Conlon & Knaus (of which firm Smietanka is senior member) were substituted as attorneys for the trustee. Sometime after the suits were filed McKey resigned as receiver of the bank and William L. O'Connell was appointed as successor receiver. Thereafter O'Connell died and Charles M. Albers was appointed receiver of the bank, and is still acting as such. Smietanka, Conlon and Knaus performed practically all of the work in the foreclosure suits. A decree of foreclosure and sale was entered in each of the cases. Foreclosure sales were held in each case and Smietanka, as trustee, bid for the property in each case and it was struck off to him. No cash was paid at the sales but the indebtednesses ^{due} to him, as trustee under the terms of the trust deeds, were applied on the bids. The sales were approved and master's certificates of sale were issued to Smietanka, as trustee, and he now holds title to each of the properties for the benefit of the owners of the notes secured by the trust deeds. In each decree of foreclosure and sale the court found that there was due to the intervenor, as trustee, certain sums for attorneys' fees, court costs, stenographer's fees, master's fees and commissioner's expenses, and that all of the said sums constituted additional indebtedness under the terms and provisions of the trust deed foreclosed. After the

notes were part of an issue of \$5,000 secured by trust deed to Julius Smetanka, as trustee, conveying certain real property. A total of \$2,500 of mortgage notes issued by Julius Smetanka, as trustee, were part of an issue of \$4,000 secured by trust deed to Julius Smetanka, as trustee, conveying certain real property. Mr. Smetanka was an organizer of the bank and at the time it went into receivership he was an officer and director of it. Details were made in the payment of some of the notes of the above issues and Smetanka, as trustee, caused the three foreclosure suits in question to be commenced. Ryan, Condon & Livingston, who were also attorneys for the receiver of the bank, filed the said suits for the trustee. During the pendency of the foreclosure suits Ryan, Condon & Livingston withdrew as attorneys for the trustee and the firm of Smetanka, Condon & Ryan (of which firm Smetanka is senior member) were substituted as attorneys for the trustee. Sometime after the suits were filed McKee resigned as receiver of the bank and William L. O'Connell was appointed as successor receiver. Thereafter O'Connell died and Charles H. Albert was appointed receiver of the bank, and is still acting as such. Smetanka, Condon and Ryan performed practically all of the work in the foreclosure suits. A decree of foreclosure and sale was entered in each of the cases. Foreclosure sales were held in each case and Smetanka, as trustee, bid for the property in each case and it was struck off to him. No cash was paid at the sales but the indebtedness ^{due} him, as trustee under the terms of the trust deeds, were applied on the bids. The sales were approved and master's certificates of sale were issued to Smetanka, as trustee, and he now holds title to each of the properties for the benefit of the owners of the notes secured by the trust deeds. In each instance of foreclosure and sale the court found that there was due to the intervenor, as trustee, certain sums for attorney's fees, costs, stenographer's fees, master's fees and commissioner's expenses, and that all of the said sums constituted additional liens in favor of the terms and provisions of the trust deed foreclosed. After the

decrees were entered Smietanka, as trustee, took possession of the properties in question, is still in possession of them, and, through his agents, is collecting the rents and profits.

Mr. Smietanka testified that he had conversations with Mr. McKey shortly after the suspension of the bank and that "he said that he had a number of the bonds and notes in default and wanted to institute foreclosure proceedings and would like me as Trustee to co-operate in all of these matters and I agreed to do so. I told him that it was to my interest to assist in liquidation of the assets of the bank, because I was a director and an organizer of it, and one of the officers. * * * Mr. Conlon [attorney for petitioner]: Did you have any other conversation with reference as to who was to be the attorney for Mr. McKey in the foreclosure proceedings? The Witness: Yes. Mr. Conlon: What was that conversation. * * * The Witness (continuing): The substance of it was that I was to go along with the general counsel of the Receiver. * * * Ryan, Condon & Livingston were the general counsel for the Receiver. I did not have any conversation with Mr. McKey with reference to who would advance the court costs and pay the attorneys' fees for these particular foreclosures, except that Ryan, Condon & Livingston were to be paid on a per diem basis out of the assets of the bank. I was never paid by the Receiver of the bank or by anyone else for the services rendered in these foreclosure proceedings. * * * The conversations were then had with the officers, or with the attorneys, Ryan, Condon & Livingston, that I would be indemnified against any costs or damages. * * * That was about the beginning of the foreclosure proceedings. I was given these assurances by Mr. Burke of the firm of Ryan, Condon & Livingston. After the work progressed to a certain point, Mr. Burke came to see me and said that they could not go along with these foreclosures, and that I, as Trustee was in a more favorable position to bring them to a conclusion. After the foreclosures were completed, I as Trustee took possession of these properties, and I am still in possession and through agents, collecting the rents and profits. I then went down to see Mr. Keenan [deputy receiver] and had a talk with

deceit were entered into, as trustee, took possession of the property in question, is still in possession of them, and, through his agents, is collecting the rents and profits.

Mr. Johnston testified that he had conversations with Mr. McKee shortly after the suspension of the bank and that the said McKee had a number of the bonds and notes in default and wanted to institute foreclosure proceedings and would like me as trustee to co-operate in all of these matters and I agreed to do so. I told him that it was to my interest to assist in liquidation of the assets of the bank, because I was a director and an organizer of it, and one of the officers. * * * Mr. Gordon [attorney for petitioner]: Did you have any other conversation with reference as to who was to be the attorney for Mr. McKee in the foreclosure proceedings? The witness: Yes.

Mr. Johnston: Yes, but that conversation, * * * The witness [testimony]: The substance of it was that I was to go along with the general counsel of the Receiver. * * * Ryan, Gordon & Livingston were the general counsel for the Receiver. I did not have any conversation with Mr. McKee with reference to who would advance the court costs and pay the attorneys' fees for these foreclosure proceedings, except that Ryan, Gordon & Livingston were to be paid on a per diem basis out of the assets of the bank. I was never paid by the Receiver of the bank or by anyone else for the services rendered in these foreclosure proceedings. * * * The conversations were then had with the officers, or with the attorneys, Ryan, Gordon & Livingston, that I would be indemnified against any costs or damages. * * * Ryan was shown the definition of the foreclosure proceedings. I was given these assurances by Mr. Burke of the firm of Ryan, Gordon & Livingston. After the work progressed to a certain point, Mr. Burke came to me and said that they could not go along with these foreclosure proceedings, and that if as trustee was in a more favorable position to bring them to a conclusion. Ryan and Livingston were completed, I as trustee took possession of these properties, and I am still in possession and through agents, collecting the rents and profits. I then went down to see Mr. Keenan [deputy receiver] and had a talk with

him about the payment of these accounts - Master's fees, costs advanced, and attorney's fees. I had prepared statements of accounts in each case and sent them to the Receiver. Six or seven months after the statements were sent, I had a conversation with Mr. Keenan, and he said he would let me know later. Two or three months later, I pressed for a settlement of the account. Mr. Keenan then told me that they were willing to pay the accounts provided that we were able to - - Mr. Moran [attorney for appellant]: Object. That is a discussion in the nature of settlement. The Court: I will reserve ruling at this time. He may answer to the reservation. The Witness (continuing): Mr. Keenan suggested that he did not think we had obtained a good title, and I as Trustee did not have authority to convey a good title by sale. We discussed the propriety of my action and the result of our conversation was that if we conformed with their ideas regarding title that they would be willing to pay the account. Mr. Moran: I ask that that be stricken. The Court: It may stand, subject to your motion to strike. The Witness: The language of the conversation was this, 'If you will show us that the Title and Trust Company will guarantee the title in you, we will pay this account, or recommend its payment.' I then took a typical case that we handled in the office, and applied for guaranty policy and I told Mr. Keenan that the Title and Trust Company, after it had made its examination was ready to guarantee the title providing we brought in a deed of conveyance to the purchaser. It developed in a subsequent conversation that the three cases in this intervening petition were registered in the office of the Registrar of Titles, and I advised Mr. Keenan that the authorities in that office would not pass on the title unless I as Trustee was ready to make conveyance to some prospective purchaser. In subsequent conversations, Mr. Keenan insisted that he would do nothing about the account unless I proceeded to organize the bondholders into a trust along the lines he had in mind. I told him that I was sure that the title I hold was one that I can deliver and will be guaranteed by the Title and Trust Company. No objections have ever been made to the title I acquired

him about the payment of these accounts - and he's been, costs advanced, and attorney's fees. I had prepared statements of accounts in each case and sent them to the Receiver, six or seven months after the statements were sent, I had a conversation with Mr. Keenan, and he said he would let me know later. Two or three months later, I pressed for a settlement of the account. Mr. Keenan then told me that they were willing to pay the accounts provided that we were able to -- Mr. Moran (attorney for appellant): Object. That is a discussion in the nature of settlement. The Court: I will reserve ruling at this time. He may answer to the reservation. The Witness (continuing): Mr. Keenan suggested that he did not think we had obtained a good title; and I as Trustee did not have authority to convey a good title by sale. We discussed the propriety of my action and the result of our conversation was that if we conformed with their ideas regarding title that they would be willing to pay the account. Mr. Moran: I ask that that be stricken. The Court: It may stand, subject to your motion to strike. The Witness: The language of the conversation was this, 'If you will show us that the Title and Trust Company will guarantee the title in you, we will pay this account, or recommend its payment.' I then took a typical case that we handled in the office, and applied for guaranty policy and I told Mr. Keenan that the Title and Trust Company, after it had made its examination was ready to guarantee the title providing we brought in a deed of conveyance to the purchaser. It developed in a subsequent conversation that the three cases in this intervening petition were registered in the office of the Registrar of Titles, and I advised Mr. Keenan that the authorities in that office would not pass on the title unless I as Trustee was ready to make conveyance to some prospective purchaser. In subsequent conversations Mr. Keenan indicated that he would do nothing about the account unless I proceeded to organize the bondholders into a trust along the lines he had in mind. I told him that I was sure that the title I held was one that I can deliver and will be guaranteed by the Title and Trust Company. No objections have ever been made to the title I acquired

by my bid at the foreclosure sale, except by Mr. Keenan and Mr. Schmidt [Keenan's assistant], and their objection was that I was not willing to call in a lot of contending bondholders and seek to do something which already was accomplished, namely, a good title set in myself as Trustee. I offered to turn over possession of the building involved to them so that they might collect the rents and apply them on account of the money that they had advanced and would advance. And in each of these cases involved in this petition demand was made upon me, or request, by Mr. McKey, to start foreclosure. Mr. Moran: At this time I renew my motion to strike Mr. Smietanka's testimony on the ground that all conversations related by Mr. Smietanka were in the nature of a compromise and were held for the purpose of settling this matter. As a second ground, Mr. Smietanka's testimony should be stricken for the reason that it goes beyond the scope of the petition. The Court: I now rule that that evidence is competent, and it may stand."

Harvey J. Keenan, called as a witness on behalf of the respondent, testified that he was a deputy receiver of the bank, appointed in 1934; that he was familiar with the records of the bank and that they do not indicate that Smietanka, Conlon & Knaus were ever appointed attorneys to act for Mr. O'Connell, receiver; that he (Keenan) never authorized that law firm to perform any services on behalf of the receiver of the bank; that he never employed that firm to represent the receiver in the three cases in question; that he never agreed, on behalf of the receiver of the bank, to pay Mr. Smietanka any fees for services performed in the said suits. The witness further testified that the three foreclosure suits were first brought to his attention in December, 1936. The witness was further examined, as follows: "Mr. Conlon: Mr. Keenan, as Deputy Receiver, after the firm of Smietanka, Conlon & Knaus substituted, did you have any conversation with Mr. Smietanka with reference to the fees and matters claimed in this petition? Mr. Moran: I object to that. The Court: Objection overruled. The Witness: Yes, sir. Mr. Conlon:

by Mr. J. J. Keenan, called as a witness on behalf of the respondent, testified that he was a deputy receiver of the bank, appointed in 1934; that he was familiar with the records of the bank and that they do not indicate that Smietanka, Conlon & Keenan were ever appointed attorneys to act for Mr. O'Donnell, receiver; that he (Keenan) never authorized that law firm to perform any services on behalf of the receiver of the bank; that he never employed that firm as receiver or receiver in the future; that in the future, he never agreed, on behalf of the receiver of the bank, to pay Mr. Smietanka any fees for services performed in the said suits. The witness further testified that the three foreclosure suits were first brought to his attention in December, 1936. The witness was further examined, as follows: "Mr. Conlon: Mr. Keenan, as Deputy Receiver, after the firm of Smietanka, Conlon & Keenan substituted, did you have any conversation with Mr. Smietanka with reference to the law and suits claimed in this petition? Mr. Keenan: I object to that. The Court: Objection overruled. The witness: Yes, sir. Mr. Conlon:

Isn't it a fact that in that conversation you stated to Mr. Smietanka that you had no objection to advancing these sums for the fees and costs, provided the liquidation trusts were set up in a manner that was acceptable to you? Mr. Moran: I object to that. These conversations had between Mr. Smietanka and Mr. Keenan were had for the purpose of compromising this matter. Mr. Keenan has no power himself to pass on whether the Receiver of the Union State Bank of South Chicago will pay the fees requested. The power to pass on whether they shall be paid lies in the Auditor of Public Accounts of the State of Illinois. The Court: I will reserve ruling on that question. He may answer subject to the reservation. The Witness: Yes, sir." The witness further testified: "The Receiver of the Union State Bank of South Chicago is not the holder of the total indebtedness outstanding in the Sinila issue. He owns \$6,100 out of a total issue of \$16,000. In the Mitchell issue, the total indebtedness is \$6,500, and the Receiver of the Union State Bank holds the sum of \$3,000. In the Starceovich issue the total indebtedness is \$4,100, and the Receiver of the Union State Bank holds \$1,400."

It was stipulated between the parties that "Charles H. Albers, as Receiver of the Union State Bank of South Chicago, or his predecessor in office made certain expenditures or advances for court costs, stenographer fees, subpoenas, and photostatic copies, in the cases of Smietanka v. Mitchell, Smietanka v. Starceovich, and Smietanka v. Sinila."

No evidence was introduced to show that Mr. Burke, connected with the firm of Ryan, Condon & Livingston, had any authority to bind the receiver of the bank to indemnify the petitioner against any costs or damages he might sustain in the foreclosure proceedings. The rights and liabilities of a trustee under a trust deed are determined by the instrument creating the trust. The trust deeds foreclosed were not introduced. In the instant case there can be no inference indulged in that there was any provision in the trust deeds that would charge a holder of one of the notes secured by the trust deed with

I don't think it is a fact that in said conversation you stated to Mr. Mahan that you had no objection to advancing these funds for the fees and costs, provided the liquidation funds were set up in a manner that was acceptable to you. Mr. Mahan: I object to that. These conversations had between Mr. Mahan and Mr. Mahan were had for the purpose of compromising this matter. Mr. Mahan has no power himself to pass on whether the Receiver of the Union State Bank of South Chicago will pay the fees requested. The power to pass on whether they shall be paid lies in the Auditor of Public Accounts of the State of Illinois. The Court: I will reserve ruling on that question. He may answer subject to the reservation. The witness: Yes, sir. The witness further testified: "The Receiver of the Union State Bank of South Chicago is not the holder of the total indebtedness outstanding in the said issue. He owns \$3,100 out of a total issue of \$16,000. In the Mitchell issue, the total indebtedness is \$3,700, and the Receiver of the Union State Bank holds the sum of \$1,000. In the Starcevic issue the total indebtedness is \$4,100, and the Receiver of the Union State Bank holds \$1,400."

It was stipulated between the parties that "Witness A. Mahan, as Receiver of the Union State Bank of South Chicago, on his predecessor in office made certain expenditures or advances for court costs, stenographer fees, subpoenas, and photostatic copies, in the case of Mahan v. Mahan, Mahan v. Mahan, and Mahan v. Mahan."

No evidence was introduced to show that Mr. Mahan, connected with the firm of Ryan, Gordon & Livingston, had any authority to bind the receiver of the same to indemnify the plaintiff against any costs or damages he might sustain in the foreclosure proceedings. The rights and liabilities of a trustee under a trust deed are determined by the instrument creating the trust. The facts herein were not introduced. In the instant case there can be no introduction in that there was any provision in the trust deeds that would require a holder of one of the notes secured by the trust deed with

all the costs and expenses of a foreclosure suit.

Appellant strenuously contends that the trustee has a lien on each of the foreclosed properties for the costs and expenses of the suits and that he must look to said property for the payment of his liens; that the order entered in the instant case is highly inequitable and without justification under the law. We agree with this contention. The trustee is an able lawyer and has had years of experience in the practice of his profession. He was an organizer, officer and director of the bank and was familiar with the rule that he who deals with a receiver of a bank does so with knowledge of the fact that the receiver is limited in the scope of his authority. Under the facts it would be idle to argue that the trustee made a binding contract with the receiver to be paid for the costs and expenses sustained in the foreclosure proceedings. Mr. Smietanka testified that he never talked with the receiver in reference to who would pay the court costs and the attorneys' fees for the foreclosure proceedings. Certainly no binding contract was shown by the statement of the trustee that Mr. Burke, connected with the firm of Ryan, Condon & Livingston, told him that he, the trustee, would be indemnified against any costs or damages in the proceedings. Mr. Smietanka testified that he told the receiver "that it was to my interest to assist in liquidation of the assets of the bank, because I was a director and an organizer of it, and one of the officers." The costs, attorneys' fees and expenses allowed a trustee in a foreclosure proceeding decree are paid to the trustee from the income or proceeds of the sale of the properties involved in the foreclosure proceedings if sufficient money is available to pay the same. The trustee in the instant case followed the usual procedure and the decrees in the foreclosure proceedings fully protected his rights. As trustee he is now in possession of the properties and collecting the rents and profits. There was no showing made that the properties will not pay the trustee what is due him under the decrees. The bank receiver is interested only in a part of the notes foreclosed in each proceeding. Yet, under the

all the costs and expenses of a foreclosure suit.
Appellant strenuously contends that the trustee has a lien
on each of the foreclosed properties for the costs and expenses of
the suit and that he must look to said property for the payment
of his liens; that the order entered in the instant case is highly
inequitable and without justification under the law. He agrees with
this contention. The trustee is an able lawyer and has had years
of experience in the practice of his profession. He was an organizer,
officer and director of the bank and was familiar with the rules that
he who deals with a receiver of a bank does so with knowledge of the
fact that the receiver is limited in the scope of his authority. Under
the facts it would be idle to argue that the trustee made a binding
contract with the receiver to be paid for the costs and expenses as-
tained in the foreclosure proceedings. Mr. Whitman testified that
he never talked with the receiver in reference to who would pay the
court costs and the attorney's fees for the foreclosure proceedings.
Certainly no binding contract was shown by the statement of the trustee
that Mr. Carter, assuming to be the kind of man, would be interested,
told him that he, the trustee, would be indemnified against any costs
or damages in the proceedings. Mr. Whitman testified that he told
the receiver "that it was to my interest to assist in liquidation of
the assets of the bank, because I was a director and an organizer
of it, and one of the officers." The costs, attorney's fees and
expenses allowed a trustee in a foreclosure proceeding because are
paid to the trustee from the income or proceeds of the sale of the
properties involved in the foreclosure proceedings if sufficient money
is available to pay the same. The trustee in the instant case followed
the usual procedure and the decree in the foreclosure proceedings
fully protected his rights. As trustee he is now in possession of
the properties and collecting the rents and profits. There was no
showing made that the properties will not pay the trustee what is
due him under the decree. The bank receiver is interested only in
a part of the notes foreclosed in each proceeding. Not, under the

order entered in this case, the bank receiver is ordered to pay the total attorneys' fees and expenses of the trustee out of the assets of the bank that belong to the depositors and creditors of the bank, the receiver to be subrogated to the rights and privileges of the trustee under the foreclosure decrees. The order in this case allows the trustee \$1,200 for attorneys' fees in the Sinila foreclosure, \$450 for attorneys' fees in the Mitchell foreclosure, and \$300 for attorneys' fees in the Starceovich foreclosure. No good reason has been shown why the trustee should not abide by the usual procedure. As we read the record the petition amounted to an effort by the trustee to accelerate the payment of his attorneys' fees and the expenses of the trustee, the receiver to advance to the trustee the amounts in question and take chances of possible reimbursement in the future. The receiver was fully justified in refusing to pay the claim of the petitioner.

The order of the Circuit court of Cook county entered March 28, 1939, is reversed.

ORDER ENTERED MARCH 28, 1939, REVERSED.

Friend, P. J., and Sullivan, J., concur.

order entered in this case, the bank receiver is ordered to pay the total attorneys' fees and expenses of the trustee out of the assets of the bank that belong to the depositors and creditors of the bank, the receiver to be subrogated to the rights and privileges of the trustee under the foreclosure decree. The order in this case allows the trustee \$1,200 for attorneys' fees in the foreclosure, \$450 for attorneys' fees in the foreclosure, and \$300 for attorneys' fees in the foreclosure. No good reason has been shown why the trustee should not abide by the usual procedure. As we read the record the petition amounted to an effort by the trustee to accelerate the payment of his attorneys' fees and the expenses of the trustee, the receiver to advance to the trustee the amounts in question and take chances of possible reimbursement in the future. The receiver was fully justified in refusing to pay the claim of the petitioner.

The order of the Circuit court of Cook county entered March 28, 1932, is reversed.

ORDER ENTERED MARCH 28, 1932, REVERSED.

Wright, P. J., and Sullivan, J., concur.

40992

JOSEPH E. MERRION,
(Plaintiff and Counter-Defendant)
Appellee.

v.

JOSEPH ALTMAN et al.,
(Defendants and Counterclaimants)
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

307 I.A. 382²

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Joseph E. Merrion, appellee, obtained a judgment by confession against Joseph Altman and Adella C. Altman, his wife, appellants, for \$607.50 upon a judgment note for \$500 signed by appellants and payable to appellee. The amount of the judgment included interest and attorney's fees. Appellants filed a verified petition praying that the judgment be vacated and set aside, that they be given leave to offer their defense to the claim, and that they be allowed to file a counterclaim. An order was entered that the judgment be opened, that defendant be allowed to make defense to the claim, that the judgment stand as security, and that defendant be given leave to file a counterclaim, plaintiff to answer the same. After a trial by the court final judgment was entered confirming the judgment entered by confession. Defendants and counterclaimants have appealed.

Appellants' verified amended defense sets up:

"1. That they are not indebted to plaintiff upon the note upon which judgment was entered herein.

"2. That said judgment is upon a note executed by them for \$500 and delivered to plaintiff under the circumstances hereinafter set forth.

"3. That during the months of April, May and June, 1937, plaintiff was a real estate broker and engaged in business as such in the City of Chicago, Illinois, and that as such real estate broker he communicated with defendants and informed them that if

JOSEPH E. WHITTON
(Plaintiff and Counterclaimant)

JOSEPH ALMAN and
ADELIE G. ALMAN
(Defendants and Counterclaimants)

STATE OF CHICAGO
COUNTY OF COOK

887 I. A. 882

MR. JUSTICE SEAMAN DELIVERED THE OPINION OF THE COURT.

Joseph E. Whittion, appellee, obtained a judgment by confession against Joseph Alman and Adelle G. Alman, his wife, appellants, for \$507.50 upon a judgment note for \$750 signed by appellants and payable to appellee. The amount of the judgment included interest and attorney's fees. Appellants filed a verified petition praying that the judgment be vacated and set aside, that they be given leave to offer their defense to the claim, and that they be allowed to file a counterclaim. An order was entered that the judgment be opened, that defendant be allowed to make defense to the claim, that the judgment stand as security, and that defendant be given leave to file a counterclaim, plaintiff to answer the same. After a trial by the court final judgment was entered confirming the judgment entered by confession. Defendants and counterclaimants have appealed.

Appellants' verified amended defense sets up:

- "1. That they are not indebted to plaintiff upon the note upon which judgment was entered herein.
- "2. That said judgment is upon a note executed by them for \$750 and delivered to plaintiff under the circumstances hereinafter set forth.
- "3. That during the months of April, May and June, 1937, plaintiff was a real estate broker and engaged in business as such in the City of Chicago, Illinois, and that as such real estate broker he communicated with defendants and informed them that if

they were interested in purchasing the real estate located at 1415-1419 East 67th Street, Chicago, Illinois, that he could obtain the same from the owner thereof at a very low price, and that if they would authorize him to do so, he would obtain the very best price possible at which they could purchase said property from the said owner; that defendants, relying upon plaintiff to obtain for them the said real estate at the very lowest price, authorized and directed plaintiff to negotiate for the purchase of said property by them, at the lowest net price to defendants; that it then and there became the duty of plaintiff to get the said real estate for defendants at the lowest price at which it could be obtained.

"4. That after defendants authorized and directed plaintiff to negotiate for the purchase of said real estate, as aforesaid, plaintiff informed defendants that the very best price for which the said real estate could be obtained was \$11,500, and defendants relying upon plaintiff and the representations made by him, and believing the said representations to be true, then and there agreed to purchase the said real estate and to pay \$11,500 therefor.

"5. That in order to pay said purchase price, defendants procured a mortgage loan in the sum of \$6,000, the proceeds of which were applied to the payment of said purchase price, and defendants paid the further sum of \$5,000 in cash and delivered to plaintiff the note sued upon herein in payment of the balance of \$500.

"6. That the said representations made by plaintiff were false and untrue, and plaintiff fraudulently and with intent to make a secret profit at the expense of defendants, informed defendants that the best price for which said real estate could be obtained was \$11,500, whereas plaintiff then and there knew that the said real estate could be obtained for much less than the sum of \$11,500, and at the cost as hereinafter set forth.

"7. That by reason of the false representations and the fraudulent conduct of plaintiff in that behalf, defendants did not know that the said real estate could be obtained for less than

they were interested in purchasing the real estate located at 1412-1414 East 67th Street, Chicago, Illinois, that he could obtain the same from the owner thereof at a very low price, and that if they would authorize him to do so, he would obtain the very best price possible at which they could purchase said property from the said owner; that defendants, relying upon plaintiff to obtain for them the said real estate at the very lowest price, authorized and directed plaintiff to negotiate for the purchase of said property by them, at the lowest net price to defendants; that at that time and there became the duty of plaintiff to get the said real estate for defendants at the lowest price at which it could be obtained.

"4. That after defendants authorized and directed plaintiff to negotiate for the purchase of said real estate, as aforesaid, plaintiff informed defendants that the very best price for which the said real estate could be obtained was \$11,200, and defendants, relying upon plaintiff and the representations made by him, and believing the said representations to be true, then and there agreed to purchase the said real estate and to pay \$11,200 therefor.

"5. That in order to pay said purchase price, defendants procured a mortgage loan in the sum of \$6,000, the proceeds of which were applied to the payment of said purchase price, and defendants paid the further sum of \$5,200 in cash and delivered to plaintiff the note and upon herein in payment of the balance of \$700.

"6. That the said representations made by plaintiff were false and untrue, and plaintiff fraudulently and with intent to make a secret profit at the expense of defendants, informed defendants that the best price for which said real estate could be obtained was \$11,200, whereas plaintiff then and there knew that the said real estate could be obtained for much less than the sum of \$11,200, and at the cost as hereinafter set forth.

"7. That by reason of the false representations and the fraudulent conduct of plaintiff in that behalf, defendants did not know that the said real estate could be obtained for less than

\$11,500 and that plaintiff was actually paying less than \$11,500 to obtain the said real estate for defendants; that several months after the said deal was consummated and defendants purchased the said property, they discovered the facts relative to the cost of obtaining said real estate, and informed plaintiff that they would not pay the note for \$500 held by him, being the note sued upon herein, and demanded that he account to them for the amount which he obtained from defendants by reason of the misrepresentations and fraud practiced upon them as hereinbefore set forth.

"8. That plaintiff had in fact obtained the said real estate for \$9,000 and plaintiff received for himself, the sum of \$2,000 in addition to the note sued upon herein in the sum of \$500, being the difference between the cost price of \$11,500 represented to and paid by defendants, and the said sum of \$9,000 paid for said real estate.

"9. That plaintiff is entitled to credits in the total sum of \$820.49 for taxes paid and allowed, title charges, and other expenses paid by him in obtaining the said real estate for defendants and consummating the purchase thereof by defendants; that after crediting the plaintiff with the said sum of \$820.49, plaintiff is indebted to defendants in the balance of \$1,679.51 for which defendants demand a counter-claim against plaintiff; that \$500 of the said sum of \$1,679.51 is represented by the note sued upon herein in the sum of \$500; that by reason of the fraudulent conduct of plaintiff in connection with the said deal, plaintiff has forfeited and is not entitled to any credits as real estate commissions or otherwise, in connection with the purchase of said real estate.

"10. That the said note sued upon herein was fraudulently obtained by plaintiff from defendants and is void and without consideration, and defendants are not indebted to plaintiff upon said note or in any ^{other} sum whatsoever."

Appellants' amended counterclaim sets up that "defendants claim that plaintiff is indebted to them in the sum of \$1,179.51

and that plaintiff was actually paying less than \$11,700 to obtain the said real estate for defendants; that several months after the said deal was consummated and defendants purchased the said property, they discovered the facts relative to the cost of obtaining said real estate, and informed plaintiff that they would not pay the note for \$7500 held by him, being the note sued upon herein, and demanded that he account to them for the amount which he obtained from defendants by reason of the misrepresentations and fraud practiced upon them as hereinbefore set forth.

"8. That plaintiff had in fact obtained the said real estate for \$9,000 and plaintiff received for himself, the sum of \$2,000 in addition to the note sued upon herein in the sum of \$700, being the difference between the cost price of \$11,700 represented to and paid by defendants, and the said sum of \$9,000 paid for said real estate.

"9. That plaintiff is entitled to credits in the total sum

of \$320.49 for taxes paid and allowed, title charges, and other expenses paid by him in obtaining the said real estate for defendants and consummating the purchase thereof by defendants; that after crediting the plaintiff with the said sum of \$320.49, plaintiff is indebted to defendants in the balance of \$1,679.51 for which defendants demand a counter-claim against plaintiff; that \$700 of the said sum of \$1,679.51 is represented by the note sued upon herein in the sum of \$700; that by reason of the fraudulent conduct of plaintiff in connection with the said deal, plaintiff has forfeited and is not entitled to any credits as real estate commissions or otherwise, in connection with the purchase of said real estate.

"10. That the said note sued upon herein was fraudulently obtained by plaintiff from defendants and is void and without consideration, and defendants are not indebted to plaintiff upon said note or in any ^{other} whatsoever.

Appellants' amended counterclaim sets up that "defendants claim that plaintiff is indebted to them in the sum of \$1,179.51

for monies fraudulently obtained by plaintiff from defendants under the following circumstances:" Then follow a number of paragraphs which are the same as paragraphs three to nine, inclusive, of appellants' amended defense. The "defendants pray judgment against plaintiff for \$1,179.51 and costs." Appellee's verified reply to the counterclaim states, inter alia, that "plaintiff states the fact to be at no time has plaintiff ever asserted to defendants or to any of defendants' agents that plaintiff or plaintiff's agents might, could or would obtain the property in question or any other property placed in plaintiff's hands for sale at the 'best possible price' or 'the lowest possible price' or used any equivalent expression with reference to so benefiting a buyer as against the interest of plaintiff's principal, the seller; * * * that defendants signed and delivered the note sued upon and upon which judgment was heretofore rendered as part of the purchase price of a certain real estate sale and transfer, in which plaintiff represented the seller and that said note was retained by plaintiff as part of plaintiff's real estate brokerage fee and commission to which he was and is entitled."

Appellants contend that appellee was their agent in the purchase of the real estate and that he was guilty of a breach of his duty to them; that the judgment is contrary to the evidence, and that the court erred in confirming the judgment by confession and in failing to give judgment for appellants upon their counterclaim.

Augusta Walsh, who owned the real estate in question, had incumbered it with a trust deed to secure her note for \$10,000. The holder of the note had a judgment by confession entered thereon and also instituted foreclosure proceedings. Mrs. Walsh wrote the following letter to her attorney, De Haan:

"Chicago, Illinois
February 13, 1937

"Messrs. Frisch & De Haan
134 N. LaSalle Street
Chicago, Illinois

"Attention Mr. De Haan

"In re: Property located at 1415-17-19
E. 67th Street

For monies fraudulently obtained by plaintiff from defendants under the following circumstances: "Then follow a number of paragraphs which are the same as paragraphs three to nine, inclusive, of appellant's amended defense. The "defendants pray judgment against plaintiff for \$1,179.31 and costs." Appellee's verified reply to the counterclaim states, *inter alia*, that "plaintiff admits the fact to be at no time has plaintiff ever asserted to defendants or to any of defendants' agents that plaintiff or plaintiff's agents might, could or would obtain the property in question or any other property placed in plaintiff's hands for sale at the 'best possible price' or 'the lowest possible price' or used any equivalent expression with reference to no benefiting a buyer as against the interest of plaintiff's principal, the seller; * * * that defendants signed and delivered the note used upon and upon which judgment was heretofore rendered as part of the purchase price of a certain real estate sale and transfer, in which plaintiff represented the seller and that said note was retained by plaintiff as part of plaintiff's real estate brokerage fee and commission to which he was and is entitled."

Appellants contend that appellee was their agent in the purchase of the real estate and that he was guilty of a breach of his duty to them; that the judgment is contrary to the evidence, and that the court erred in confirming the judgment by confession and in failing to give judgment for appellee upon their counterclaim.

Appellee, who owned the real estate in question, had indorsed it with a trust deed to secure her note for \$10,000. The holder of the note had a judgment by confession entered thereon and also instituted foreclosure proceedings. Mrs. Welsh wrote the following letter to her attorney, De Mann:

"Chicago, Illinois
February 13, 1937

"Messrs. Fitch & De Mann
136 E. Lake Street
Chicago, Illinois

"Attention Mr. De Mann

"My dear Mr. De Haan:

"Supplementing our conversation, you may consider this your authority to contact the Receiver of the Woodlawn Trust & Savings Bank with the understanding that I will deliver title to him upon a cancellation of the first mortgage indebtedness now against the property. You are also authorized to contact Mr. J. M. Merrion of J. M. Merrion & Company with the definite understanding that any services rendered by him are to be without costs to myself, for the purpose of securing a cancellation of the first mortgage indebtedness in consideration of a conveyance of the property."

Although appellee testified, over the objection of appellants, that before the above letter was written, he had a talk with a son of Mrs. Walsh, at which time the son stated that he wanted to get appellee authority from his mother "to work on the deal and whatever money was made, we would get for working out this deal, and he got me a letter of authority to work on the deal in February, 1937," he admitted that the letter of February 13 was the sole source of authority to act for Mrs. Walsh. Appellee was a real estate broker and advertised properties for sale. Appellant Joseph Altman, at the time in question, was a public high school teacher for the city of Chicago. He had some money to invest and seeing certain advertisements of appellee he called at the latter's office and talked with one Corbett, employed as a salesman by appellee, in regard to purchasing real estate. Altman testified that he inquired about apartment buildings and several were shown him by Corbett, but that he did not care to buy any of them; that Corbett then told Altman that he had some stores that could be bought at a bargain price, and described the premises, which proved to be the Walsh property; that Corbett stated that the property would be available in about ten days, that he knew the owner and he felt he could get a good buy on the property; that Altman told Corbett to go out and do the best he could, that he wanted to get a good deal on the property, the best possible; that Corbett then said he would go out and get the best deal for Altman that he could; that he knew the property was all right; "that he knew these people and that we could make a good deal and that he could get a good deal for me and get

"I have not seen him."

to a conveyance of the property.

Although appellee testified, over the objection of appellee, that before the above letter was written, he had a talk with a son of Mrs. Walsh, at which time the son stated that he wanted to get appellee authority from his mother "to work on the deal and whatever money was made, we would get for working out this deal, and he got in a letter of authority he wrote on the 1st of February, 1937," he admitted that the letter of February 1st was the sole source of authority to act for Mrs. Walsh. Appellee was a real estate broker and advertised properties for sale. Appellant Joseph Altmann, at the time in question, was a public high school teacher for the city of Chicago. He had some money to invest and seeing certain advertisements of appellee he called at the latter's office and talked with one Corbett, employed as a salesman by appellee, in regard to purchasing real estate. Altmann testified that he inquired about investment opportunities and Corbett was shown him by Corbett, that he did not care to buy any of them; that Corbett then told Altmann that he had some stores that could be bought at a bargain price, and described the premises, which proved to be the Walsh property; that Corbett stated that the property would be available in about ten days, that he knew the owner and he felt he could get a good buy on the property; that Altmann told Corbett he was all right, that he could, that he wanted to get a good deal on the property, the best possible; that Corbett then said he would go out and get the best deal for Altmann that he could; that he knew the property was all right; that he knew these people and that he could make a good deal and that he could get a good deal for me and get

the best deal possible;" that Altman asked Corbett how much the property would cost and Corbett stated that there was a mortgage on it for \$10,000, "that it would take \$11,000 or so in order to put the deal across," that Altman would have to make a down payment of \$5,000, and Corbett would have "no trouble about arranging for the balance of approximately \$6,000;" that Altman told Corbett that the figure sounded satisfactory to him and for Corbett to go ahead. Altman further testified that he had several conversations with Corbett concerning the deal; that in the first conversation, in April or May, 1937, Corbett stated that he could get the property for about \$11,000, and that he would try to get it for that amount; that when Altman called again several days later Corbett stated to him that he could not get the property for \$11,000 and that he would have to have \$11,500; that several other people were trying to buy the property at \$11,000; that he (Corbett) was dealing with a lady by the name of Mrs. Walsh, who was selling the property. Altman further testified that he did not know the property was incumbered and that a deal was necessary in order to clear the title; that Corbett "did not mention at any time, anything about clearing the title or what it would cost." Altman finally agreed to pay \$11,500 for the property and he and his wife signed a contract. Altman received a copy of the contract but turned it over to appellee. It does not appear to have been introduced in evidence. Appellants paid \$5,000 in cash to appellee and gave him the judgment note in question, for \$500, which was made payable to the order of appellee. In addition, appellee appears to have obtained a loan of \$6,000 for appellants, which was secured by their trust deed on the property in question. Appellee obtained the proceeds of this loan. Altman testified that he supposed, from his dealings with Corbett, that Mrs. Walsh was getting the \$11,500 for her property. Mrs. Walsh received nothing in the transaction. She appears to have quitclaimed the property, but to whom is not clear from the record. The Walsh mortgage was at the time the property of the Woodlawn Trust & Savings Bank, which was then in receivership.

the best deal possible," that Altman asked Corbett how much the property would cost and Corbett stated that there was a mortgage on it for \$10,000, "that is would take \$11,000 or so in order to get the deal across," that Altman would have to make a down payment of \$2,000, and Corbett would have "no trouble about arranging for the balance of approximately \$9,000;" that Altman told Corbett that the figure seemed satisfactory to him and for Corbett to go ahead.

Altman further testified that he had several conversations with Corbett concerning the deal; that in the first conversation, in April or May, 1937, Corbett stated that he could get the property for about \$11,000, and that he would try to get it for that amount; that when Altman called again several days later Corbett stated to him that he could not get the property for \$11,000 and that he would have to have \$11,500; that several other people were trying to buy the property at \$11,000; that he (Corbett) was dealing with a lady by the name of Mrs. Walsh, who was selling the property. Altman further testified that he did not know the property was incumbered and that a deal was necessary in order to clear the title; that Corbett "did not mention at any time, anything about clearing the title or what it would cost."

Altman finally agreed to pay \$11,500 for the property and he and his wife signed a contract. Altman received a copy of the contract but turned it over to appellee. It does not appear to have been introduced in evidence. Appellants paid \$2,000 in cash to appellee and gave him the judgment note in question for \$9,500, which was made payable to the order of appellee. In addition, appellee appears to have obtained a loan of \$6,000 for appellants, which was secured by their first deed on the property in question. Appellee obtained the proceeds of this loan. Altman testified that he supposed, from his dealings with Corbett, that Mrs. Walsh was getting the \$11,500 for her property. Mrs. Walsh received nothing in the transaction. It appears to have disclaimed the property, but to whom it is not clear from the record. The Walsh mortgage was at the time the property of the Western Trust & Savings Bank, which was then in receivership.

On June 6, 1937, appellee offered to pay the receiver of the Bank \$9,000 in full settlement of the Walsh mortgage note. The receiver accepted the offer on June 21, 1937, and on June 24, 1937, a court order was entered approving the settlement made by the receiver. The Altman deal was consummated in July, 1937, in the escrow department of the Chicago Title and Trust Company. Save that she wrote the letter of February 13, Mrs. Walsh, "due to her advanced age and the precarious condition of her health," took no part personally in the transaction in question. She did not receive any money from the proceeds of the sale, nor did she pay any money in the transaction. Attorney De Haan testified that it was his understanding that appellee "had someone who was interested in the purchase of this property."

Appellee states his theory as follows: "Plaintiff's theory is that he was the broker for the owner of the property in question; that he had her authority to sell said realty to defendants, but that if he did not have such authority it would not constitute him agent for defendants; that neither plaintiff nor his agent told defendants that \$11,500 was the best price for which the owner would sell or that defendants could procure the property at a bargain price; but that even if such statements had been made they were not actionable and defendants had no right to rely upon them; and that any profit realized by plaintiff in the transaction came from the owner and is of no legal concern to defendants." Appellee sought to prove by the testimony of Corbett that the latter did not make any statements to Altman that would cause Altman to believe that appellee was acting for the Altmans in the transaction; but when the entire testimony of Corbett is considered in the light of the testimony of Altman and certain undisputed mountain peaks in the case, it is plain that the testimony of Corbett did not successfully rebut the testimony of Altman in reference to the transaction. Corbett conceded that he pretended to be carrying on negotiations between the Altmans and the owners of the property in reference to the price; that he told Altman to make a written offer and he "would submit it to the owners;" that he never submitted any of

On June 6, 1937, appellee offered to pay the receiver of the bank \$2,000 in full settlement of the bank mortgage note. The receiver accepted the offer on June 21, 1937, and on June 24, 1937, a court order was entered approving the settlement made by the receiver. The Altman deal was consummated in July, 1937, in the record department of the Chicago Title and Trust Company. There that she wrote the letter of February 13, Mrs. Welsch, "due to her advanced age and the precarious condition of her health," took no part personally in the transaction in question. She did not receive any money from the proceeds of the sale, nor did she pay any money in the transaction. Attorney De Leon testified that it was his understanding that appellee "and someone who was interested in the purchase of this property."

Appellee states his theory as follows: "Plaintiff's theory is that he was the broker for the owner of the property in question; that he had not authority to sell realty to defendants, but that if he did not have such authority it would not constitute him agent for defendants; that neither plaintiff nor his agent sold defendants that \$11,700 was the best price for which the owner would sell or that defendants could procure the property at a bargain price; but that even if such statements had been made they were not actionable and defendants had no right to rely upon them; and that any profit realized by plaintiff in the transaction came from the owner and is of no legal concern to defendants." Appellee sought to prove by the testimony of Corbett that the latter did not make any statements to Altman that would cause Altman to believe that appellee was acting for the Altmans in the transaction; but when the entire testimony of Corbett is considered in the light of the testimony of Altman and certain undisputed material facts in the case, it is plain that the testimony of Corbett did not successfully rebut the testimony of Altman in reference to the transaction. Corbett testified that he pretended to be acting on negotiations between the Altmans and the owners of the property in reference to the price; that he told Altman to make a written offer and he would submit it to the owners; that he never submitted any of

the offers made by Altman, to Mrs. Walsh, and that he never saw Mrs. Walsh. Corbett concealed from Altman the fact that the holder of the Walsh mortgage would release Mrs. Walsh from her indebtedness upon the note upon receiving \$9,000. It is clear that the Altmans, in paying the money and notes, thought that they were buying the property from Mrs. Walsh and that she was receiving the purchase price. It will be noted that appellee, in his answer to the counter-claim, states: "Said note was retained by plaintiff as part of plaintiff's real estate brokerage fee and commission to which he was and is entitled." Under the facts of this case appellee could not charge Mrs. Walsh for brokerage fees and commission, nor could he reasonably charge the Altmans a brokerage fee unless he was acting as their agent in the transaction.

It is sufficient to say, in regard to the law of this case, that when we find, as we do, that appellee was the agent of the Altmans in the purchase of the real estate and that he was guilty of a breach of his duty to them, the law is settled. In Salsbury v. Ware, 183 Ill. 505, the plaintiff furnished the defendant with \$12,480 to be applied to the purchase of certain lands from the owners thereof. The defendant applied only \$6,640 toward the purchases and appropriated the difference to himself. The plaintiff contended that the defendant undertook to buy the land for him as his agent and that the defendant deceived him by making him believe that he paid \$12,480, whereas he paid only \$6,640 therefor. The defendant contended that he in no way acted as agent for the plaintiff. The Supreme court said that the determination of the case depended upon the relation which existed between the plaintiff and the defendant, and further said (pp. 510-512):

"It cannot be said that, in making these purchases, Ware acted as agent for Ingraham and Thompson, the owners of the property. The theory, that he was acting as agent for the vendors, is negatived by his contention, that he was himself the owner of the property, and was selling it as his own property to the appellant. If he owned the property himself, or had been given options for the purchase of it

the offers made by Aliman, to Mrs. Walsh, and that he never saw Mrs. Walsh. Corbett concealed from Aliman the fact that the holder of the Walsh mortgage would release Mrs. Walsh from her indebtedness upon the note upon receiving \$3,000. It is clear that the Alimans, in paying the money and notes, thought that they were buying the property from Mrs. Walsh and that she was receiving the purchase price. It will be noted that appellee, in his answer to the counter-claim, states: "Said note was retained by plaintiff as part of plaintiff's real estate brokerage fee and commission to which he was and is entitled." Under the facts of this case appellee could not charge Mrs. Walsh for brokerage fees and commission, nor could he reasonably charge the Alimans a brokerage fee unless he was acting as their agent in the transaction.

It is sufficient to say, in regard to the law of this case, that when we find, as we do, that appellee was the agent of the Alimans in the purchase of the real estate and that he was guilty of a breach of his duty to them, the law is settled. In Salisbury v. Ware, 183 Ill. 505, the plaintiff furnished the defendant with \$12,480 to be applied to the purchase of certain lands from the owners thereof. The defendant applied only \$6,640 toward the purchase and appropriated the difference to himself. The plaintiff contended that the defendant undertook to buy the land for him as his agent and that the defendant deceived him by making his bid for the land only \$6,640, whereas he paid only \$12,480. The defendant contended that he is not bound as agent for the plaintiff. The supreme court said that the determination of the case depended upon the relation which existed between the plaintiff and the defendant, and further said (21-211):

"It cannot be said that, in making these purchases, were acted as agent for Ingraham and Thompson, the owners of the property. The theory, that he was acting as agent for the vendors, is negatived by his contention, that he was himself the owner of the property, and was selling it as his own property to the appellant. If he owned the property himself, or had been given options for the purchase of it

by the owners, he certainly was not acting as the agent of such owners in making the sales.

"He never told Salsbury, the appellant, nor did the appellant ever know until shortly before the present bill was filed, that the appellee, Ware, claimed to own the property, or to be selling it as his own property, or that he had, or claimed to have, any interest of any kind in it.

"The evidence shows, that Salsbury dealt with Ware as his his agent, or in such a way that a trust relationship existed between them. Ware had no right to take advantage of that relationship to make a profit for himself, which properly belonged to Salsbury. The position, which he occupied towards Salsbury, was one of trust and confidence, and, inasmuch as trust and confidence were placed in him by Salsbury, he could not take advantage thereof to the injury of Salsbury.

"The law upon this subject is well settled. In equity, an agent is disabled from dealing in the matter of his agency on his own account. The agency being established, the agent will be compelled to transfer the benefit of his contract to his principal, even though he may swear that he purchased on his own account. It makes no difference that such agent is a mere volunteer; if he professes to act not for himself but for another, he has trust and confidence^{placed} in him. The rule applies as well to an agent, who becomes such by volunteering, as to one who is made such by appointment. If confidence is reposed, it must be faithfully acted upon and preserved from any intermixture of imposition. The party relied upon must see, that he meets fairly and squarely the responsibility of his position, and does not take any advantage, either for his own gain, or to the injury of the person whom he represents. If a party employs an agent to make a purchase of land, he is entitled to all the skill, ability and industry of such agent to make the purchase on the best terms that can be had, and is entitled to the property at the price the agent pays. The agent cannot avail himself of any advantage his position

by the owners, he certainly was not acting as the agent of such owners in making the sales.

"He never told Salisbury, the appellant, nor did the appellant ever know until shortly before the present bill was filed, that the appellant, who, claimed to own the property, or to be entitled to his own property, or that he had, or claimed to have, any interest of any kind in it.

"The appellant shows that defendant dealt with him as his agent, or in such a way that a third person would be entitled to rely upon his statements of fact and authority as a basis for his own action. Salisbury, which he occupied towards Salisbury, was one of trust and confidence, and, inasmuch as trust and confidence were placed in him by Salisbury, he could not take advantage thereof to the injury of Salisbury.

"The law upon this subject is well settled. In equity, an agent is disabled from dealing in the matter of his agency on his own account. The agency being established, the agent will be compelled to transfer the benefit of his contract to his principal, even though he may swear that he purchased on his own account. It makes no difference that such agent is a mere volunteer; if he professes to act not for himself but for another, he has trust and confidence placed in him. The rule applies as well to an agent, who becomes such by volunteering, as to one who is made such by appointment. If confidence is reposed, it must be faithfully acted upon and preserved from any interference of imposition. The party relied upon must see that he meets fairly and squarely the responsibility of his position and does not take any advantage, either for his own gain, or to the injury of the person whom he represents. If a party employs an agent to make a purchase of land, he is entitled to all the skill, industry and industry of such agent to make the purchase on the best terms that can be had, and is entitled to the property at the price the agent pays. The agent cannot avail himself of any advantage in his position

may give him to speculate to the injury of his principal; all the profits and advantages gained in the transaction belong to the principal. (Casey v. Casey, 14 Ill. 112; Dennis v. McCagg, 32 id. 429; Cotton v. Molliday, 59 id. 176; Conant v. Riseborough, 139 id. 383; Helberg v. Nichol, 149 id. 249.)" (Italics ours.) The court held that the defendant was required to account to the plaintiff for the difference, amounting to \$5,840, retained by the defendant. See, also, the late case of Lerk v. McCabe, 349 Ill. 348, where the court said (pp. 360, 361):

"The relation of principal and agent is one of trust and confidence, and where such confidence is reposed and such relation exists it must be faithfully acted upon and preserved from any intermixture of imposition. The rule is the same no matter how large or how small the commission paid may be or whether the agent is a mere volunteer at a nominal consideration. (Perry v. Engel, 296 Ill. 549.) An agent acting for the purchaser of land, whether by appointment or as a volunteer, must see that he meets fairly and squarely the responsibility of his position and does not take any advantage, either for his own gain or to the injury of the person whom he represents. (Salsbury v. Warg, 183 Ill. 505.) The rule is well established in equity that the relation existing between principal and agent for the purchase or sale of property is a fiduciary one, and the agent in the exercise of good faith is bound to keep his principal informed on all matters that may come to his knowledge pertaining to the subject matter of the agency. (Reiger v. Brandt, 329 Ill. 21.) An agent must not put himself, during the continuance of his agency, in a position adverse to that of his principal. To the latter belongs the exercise of all the skill, ability and industry of the agent. If a party employs an agent to make a purchase of land he is entitled to all the skill, ability and industry of such agent to make the purchase on the best terms that can be had. (Cotton v. Molliday, 59 Ill. 176.) An agent cannot deal for his own advantage with the things purchased for his principal, or become a seller or buyer of them, because of his confidential relation and his

duty to disclose to his principal every fact, circumstance or advantage in relation to the purchase which may come to his knowledge. (McDonald v. Fithian, 1 Gilm. 269; Strong v. Lord, 107 Ill. 25.) An agent cannot directly or indirectly acquire an interest in his principal's business without the principal's consent freely given and with full knowledge of every matter known to the agent which might in any way affect the principal's interest, and it is of no consequence that no fraud was intended or that no advantage was derived by the agent. (Fox v. Simons, 251 Ill. 316.)" Many other cases to the same effect might be cited, but the rule is too well settled to require further citations.

Under the facts of this case, as we find them, and the settled law bearing upon the facts, it is plain that the judgment for \$607.50 entered in the trial court against the Altmans, appellants, must be reversed.

As to the counterclaim of the Altmans: Appellee, counter-defendant, received from the Altmans \$11,500. The Altmans frankly concede that they must do equity by appellee and they admit that he is entitled, in addition to the \$9,000 that was paid to the receiver, to credit for certain items amounting to \$812.99, making the total amount of credits conceded to be due appellee \$9,812.99. There are two items that appellee claims he is also entitled to in any event, viz., \$60, that he spent in advertising the property "before Mr. Altman came into the picture," and \$750, which he claims he owes an attorney for services in securing the release of the Walsh note and the judgment thereon. Appellee did not testify that he paid the attorney \$750 for the services. We are of the opinion that appellants should allow appellee something for the services, but \$750 is an excessive amount. In our judgment \$375 would be a reasonable fee for the services and that amount is allowed. There is no good reason why appellants should be charged for the advertising item. As the claim of appellee for the \$500 note has been disallowed by our judgment, the amount of that note should be deducted from the

... duty to disclose to his principal every fact, circumstance or
advantage in relation to the purchase which may come to his knowl-
edge. ... An agent cannot directly or indirectly acquire an interest in
his principal's business without the principal's consent freely
given and with full knowledge of every matter known to the agent
which might in any way affect the principal's interest, and it is
of no consequence that no fraud was intended or that no advantage
was derived by the agent. ... other cases to the same effect might be cited, but the rule is too
well settled to require further citation.

Under the facts of this case, as we find them, and the
settled law bearing upon the facts, it is plain that the judgment
for \$607.50 entered in the trial court against the defendant,
appellants, must be reversed.

As to the counterclaim of the defendant: Appellee, counter-
claimant, testifies that on January 11, 1900, the defendant
conceded that they must do equity by appellee and they admit that
he is entitled, in addition to the \$2,000 that was paid to the
defendant, to credit for certain items amounting to \$212.92, making
the total amount of credits conceded to be due appellee \$7,812.92.
There are two items that appellee claims he is also entitled to in
any event, viz., \$50, that he spent in advertising the property
before it was sold, and \$750, which he claims
he owes an attorney for services in securing the release of the Walsh
note and the judgment thereon. Appellee did not testify that he paid
the attorney \$750 for the services. We are of the opinion that
appellants should allow appellee something for the services, but
\$750 is an excessive amount. In our judgment \$375 would be a reason-
able fee for the services and that amount is allowed. There is no
good reason why appellants should be charged for the advertising
item. As the claim of appellee for the \$700 note has been disallowed
by our judgment, the amount of that note should be deducted from the

total amount received by appellee from appellants, leaving the net amount that he received from appellants \$11,000. The total amount of credits to which appellee is entitled is \$10,187.99, which deducted from \$11,000 leaves \$812.01, and appellants are entitled to judgment for that amount upon their counterclaim.

The judgment of the Municipal court of Chicago of \$607.50 in favor of Joseph E. Merrion, appellee, plaintiff in the court below, and against Joseph Altman and Adella C. Altman, appellants, defendants in the court below, is reversed; and judgment is entered here in favor of Joseph Altman and Adella C. Altman, appellants, upon the counterclaim, and against Joseph E. Merrion, appellee, in the sum of \$812.01.

JUDGMENT REVERSED; AND JUDGMENT HERE IN
FAVOR OF APPELLANTS (COUNTERCLAIMANTS)
AND AGAINST APPELLEE (COUNTER-DEFENDANT)
IN THE SUM OF \$812.01.

Friend, P. J., concurs.
John J. Sullivan, J., took no part in the decision of this case.

41116

IN RE ESTATE OF WILLIAM H.
HAEGELE, Deceased.

MYRA HAEGELE DRIEVER,
Objector and Appellant,

v.

MARTHA HAEGELE,
Executrix and Appellee.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

307 I.A. 383¹

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

William H. Haegele died on July 9, 1931. By a will (date of the same not shown in the record) he left his entire estate in equal parts to his widow, Martha Haegele, and Myra Haegele Driever, a daughter by his first wife. They were named joint executrices and qualified as such in the Probate court of Cook county, but later the daughter resigned by leave of court. Martha Haegele, executrix (appellee), filed an inventory certifying that no real estate nor personal property belonging to the deceased had come to her hands, possession or knowledge. Myra Haegele Driever (appellant) filed exceptions to the inventory, in which she charged, inter alia, that deceased owned, at the time of his death, 3,443 of the 12,000 shares of the capital stock of the Haegele Ice Company, a corporation. In the Probate court the trial judge found that Haegele was the owner of the said 3,443 shares at the time of his death and ordered the executrix to file a supplemental inventory charging herself with said shares. The executrix prayed an appeal to the Circuit court, where, upon a trial de novo, the trial judge found that Haegele was not the owner of the said shares at the time of his death and ordered that all exceptions of Myra Haegele Driever to the inventory of the executrix be overruled and denied. Judgment for costs for \$21.50 was entered against the objector (appellant),

11110

IN RE ESTATE OF WILLIAM M. KEEGLE,
DECEASED.

WYMA KEEGLE DRIVER,
OBJECTOR.

MARTHA KEEGLE,
Executrix and Appellee.

WYMA KEEGLE DRIVER
OBJECTOR

3031.A.383

WILLIAM M. KEEGLE died on July 9, 1931. By a will (date of the same not shown in the record) he left his entire estate in equal parts to his widow, Martha Keegle, and Wyma Keegle Driver, a daughter by his first wife. They were named joint executrices and qualified as such in the Probate court of Cook county, but later the daughter resigned by leave of court. Martha Keegle, executrix (appellee), filed an inventory certifying that no real estate nor personal property belonging to the deceased had come to her hands, possession or knowledge. Wyma Keegle Driver (appellant) filed exceptions to the inventory, in which she charged, inter alia, that deceased owned, at the time of his death, 3,443 of the 12,000 shares of the capital stock of the Keegle Ice Company, a corporation. In the Probate court the trial judge found that Keegle was the owner of the said 3,443 shares at the time of his death and ordered the executrix to file a supplemental inventory charging herself with said shares. The executrix prayed an appeal to the Circuit court, where, upon a trial de novo, the trial judge found that Keegle was not the owner of the said shares at the time of his death and ordered that all exceptions of Wyma Keegle Driver to the inventory of the executrix be overruled and denied. Judgment for costs for \$21.50 was entered against the objector (appellant).

which judgment was satisfied in open court by appellant and an order to that effect was entered. Eighteen days later appellant served a notice of appeal and subsequently perfected her appeal in this court.

Appellant contends that the court erred in holding that the said stock did not belong to the estate of William H. Haegele; that the instrument introduced in evidence (hereinafter set out in full) is merely an appointment of an agent and a direction to him to bring about the transfer of the stock in the future; that since the principal died before the directions were executed the agency terminated, and the stock belonged to the deceased at the time of his death. Appellee contends that the instrument in question "is a direction by beneficiaries, one of whom was William H. Haegele, to David S. Horwich, the trustee, transferring and vesting said Haegele's ice stock interest in his wife; and Secondly, in any event, the evidence, both oral and written conclusively shows that William H. Haegele, during his lifetime, divested himself of any interest in the stock in question to the sole benefit of his wife Martha Haegele."

The material facts in the case are not in dispute. William H. Haegele owned 3,443 shares of stock in the Haegele Ice Company. On October 20, 1930, David S. Horwich, attorney, was appointed a trustee by all of the stockholders of the Haegele Ice Company. The instrument creating the trusteeship is not in evidence, but Horwich testified that by the terms of the trust he was to liquidate the assets and distribute the proceeds to the stockholders and that by May 1, 1931, the corporation had been practically liquidated. The 3,443 shares of stock were then in the hands of the Prudential Trust and Savings Bank as collateral. On May 22, 1931, approximately two months prior to the death of Haegele, the latter "summoned" Horwich to Twin Lakes, Wisconsin, where Haegele was then residing, and when Horwich arrived at the home of Haegele at that place he found there, in addition to Haegele, Henry Haegele, a brother of

which judgment was recalled in open court by appellant and an order to that effect was entered. Fifteen days later appellant served a notice of appeal and subsequently perfected her appeal in this court.

Appellant contends that the court erred in holding that the said stock did not belong to the estate of William H. Haegels; that the instrument introduced in evidence (hereinafter set out in full) is merely an appointment of an agent and a direction to him to bring about the transfer of the stock in the future; that since the principal died before the directions were executed the agency terminated, and the stock belonged to the deceased at the time of his death. Appellee contends that the instrument in question "is a direction by beneficiaries, one of whom was William H. Haegels, to David S. Norwich, the trustee, transmitting and vesting said Haegels's ice stock interest in his wife; and secondly, in any event, the evidence, both oral and written conclusively shows that William H. Haegels, during his lifetime, divested himself of any interest in the stock in question to the sole benefit of his wife Martha Haegels."

The material facts in the case are not in dispute. William H. Haegels owned 2,443 shares of stock in the Haegels Ice Company. On October 20, 1931, David S. Norwich, attorney, was appointed trustee by all of the stockholders of the Haegels Ice Company. The instrument creating the trusteeship is not in evidence, but Norwich testified that by the terms of the trust he was to liquidate the assets and distribute the proceeds to the stockholders and that by May 1, 1931, the corporation had been practically liquidated. The 2,443 shares of stock were then in the hands of the Prudential Trust and Savings Bank as collateral. On May 22, 1931, approximately two months prior to the death of Haegels, the latter "summoned" Norwich to Twin Lakes, Wisconsin, where Haegels was then residing and when Norwich arrived at the home of Haegels at that place he found there, in addition to Haegels, Henry Haegels, a brother of

William; Mr. and Mrs. Schnitzer; Louise Kircher, a sister of William; and the appellee. Louise Kircher was a sister of William and Henry, and Mrs. Schnitzer was a daughter of Louise. Horwich (called as a witness by appellant) testified that William Haegele told him that "he wanted to make arrangements about the Twin Lakes property, the vacant lots. Q. What did he say, if anything, with respect to this stock or his interest in the corporation? A. He said his daughter was getting forty thousand dollars in insurance money and she was amply protected. He wanted me to draw a document, as trustee, that I would be directed that that stock the bank was to return, that stock was to be paid to Martha Haegele." The witness then stated that at the direction of Haegele he drew up the following instrument:

"May 22, 1931.

"(1) David S. Horwich, trustee, is hereby directed to take steps at his discretion to secure from the Prudential bank, stock, insurance, etc., placed as security by William, Henry, and Charles Haegele, which deposits were made for the benefit of Haegele Ice Co.

"(2) David S. Horwich, trustee, is hereby further directed to consider the common stock in the Haegele Ice Company, now in the name of William Haegele and held by the Prudential Bank, as stock which the bank was to return to William Haegele, and to place so far as possible the interest of William Haegele in said stock in the name of Martha Haegele, with Martha Haegele to have full authority to vote the said stock, and the securities purchased by David S. Horwich, trustee, from the funds held for the payment of said stock shall be turned over to Martha Haegele when the stock at the bank shall have been returned or cancelled together with any monies which may be payable later on the said stock.

"(3) David S. Horwich, trustee, is hereby directed to pay to William Haegele the sum of \$50.00 per month for the board and upkeep of Charles Haegele until all of Charles Haegele's stock in the Haegele Ice Company, has been retired at the rate of \$2.00 per

William, Mr. and Mrs. Schmitzer; Louise Kircher, a sister of William, and the appellee. Louise Kircher was a sister of William and Henry, and Mrs. Schmitzer was a daughter of Louise. Horwich (called as a witness by appellant) testified that William Haegels told him that "he wanted to make arrangements about the twin lakes property, the vacant lots. Q. What did he say, if anything, with respect to this stock or his interest in the corporation? A. He said his daughter was getting forty thousand dollars in insurance money and she was empty protested. He wanted me to draw a document, as trustee, that I would be directed that that stock the bank was to return, that stock was to be paid to Martha Haegels." The witness then stated that at the direction of Haegels, he drew up the following instrument:

- 2 -

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"(2) David S. Horwich, trustee, is hereby further directed to consider the common stock in the Haegels Ice Company, now in the name of William Haegels and held by the Prudential Bank, as stock which the bank was to return to William Haegels, and to place so far as possible the interest of William Haegels in said stock in

the name of Martha Haegels, with Martha Haegels to have full authority to vote the said stock, and the securities purchased by David S. Horwich, trustee, from the funds held for the payment of said stock shall be turned over to Martha Haegels when the stock at the bank shall have been returned or cancelled together with any monies which may be payable later on the said stock.

"(3) David S. Horwich, trustee, is hereby directed to pay to William Haegels the sum of \$50.00 per month for the bond and amount of Charles Haegels until all of Charles Haegels' stock in the Haegels Ice Company, has been retired at the rate of \$2.00 per

share, and after such time, Louise B. Kircher, William Haegele and Henry Haegele, are to share the board and clothing and medical expense of said Charles Haegele, share and share alike as long as said Charles Haegele lives.

"All by order of the undersigned.

"David S. Horwich,
Trustee.
"William Haegele,
"Henry Haegele,
"Louise B. Kircher."

The witness further testified that "upon William Haegele's death I collected \$23,861, which was the net amount due under the policy, and distributed the money to the common stockholders and delivered the pro rata amount due on William Haegele's stock, pursuant to this letter of direction, to Martha Haegele;" that Martha Haegele never had the 3,443 shares of stock in her possession and that the stock certificates were still in the bank's possession. In respect to the shares of stock the witness further testified: "The bank had agreed to return the 3443 shares to William Haegele together with the stock that Mrs. Kirchner, a sister, had up as collateral with the Haegele Ice loan. They had agreed to return that collateral to the owners if I presented them with a certified copy of a resolution from the bookkeeper of the Lincoln Ice Company guaranteeing to indemnify the bank on the bond issue. In other words the Lincoln Ice Company were to be liable to the same extent as the Haegele Ice Company, the maker of those bonds. Q. Then did you indemnify them to that extent?

A. I presented the certified copy of that resolution to the bank and gave them sixty days to return William Haegele's stock. Q. To you as trustee? A. Yes, to me as trustee, which they did not do."

Harry [Henry] Schnitzer testified that on May 22, 1931, "we were called out to Twin Lakes where Mr. Haegele resided at that time because they were dividing some property up that my mother-in-law, Mrs. Kirchner, was interested in. When we got out there we got finished with dividing the property and Haegele stated at that time that he wanted this ice stock and all proceeds to be turned over to

share, and after such time, Louise B. Kirchner, William Haegele and Henry Haegele, are to share the bond and clothing and medical expense of said Charles Haegele, share and share alike as long as said Charles Haegele lives.

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"David G. Norrish,
Trustee,
William Haegele,
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his wife at that time, Martha Haegele. A document was drawn up at that time which I read because I believe my mother-in-law signed it at that time and we usually read practically everything she signed. He did state at that time, in fact he has stated that the insurance was turned over to his daughter and the only thing he had left, outside of the Twin Lakes property, was the stock which he wanted turned over to his wife. Q. I will show you Respondent's Exhibit No. 1, and ask you if that is a copy of the instrument that you mentioned? A. That is right. Q. Did you see that signed by William Haegele? A. I saw it signed and I read it before it was signed." Appellant's counsel did not cross-examine the witness save to show the relationship of Louise Kircher and the Schnitzers to William Haegele. Mrs. Schnitzer testified that on May 22, 1931, "my uncle asked us to come over to his Twin Lakes home because he was very anxious to divide the property that the Haegele Ice Company owned and also to make arrangements for his wife, Martha Haegele, to receive the money due on the stock of the Haegele Ice Company. He said that his daughter was getting all of his life insurance policies and he wanted her to get whatever money was due on the stocks of the Haegele Ice Company. Q. He wanted her to get them. Who do you mean by 'her'? A. Martha Haegele, his wife. Q. What was done? A. A paper was drawn up, which my husband read and my mother signed on May 22, 1931. Q. I show you this document, Respondent's Exhibit No. 1, and I ask you to say whether this was the paper that was signed? A. Yes, this is my mother's signature. * * * Mr. Matheny [attorney for appellant]: No cross examination." Appellant testified that on May 1, 1931, the 3,443 shares of stock of the Haegele Ice Company were "up as collateral at that time with the bank, together with his life insurance policies;" that she was the beneficiary in the life insurance policies; that she knew her father owned the stock because it was up with the bank with the life insurance policies as collateral; that she did not know, personally, that the stock "was up with the bank," but she learned that fact after the death of

his wife at that time, Martha Macgale. A document was drawn up at that time which I read because I believe my mother-in-law signed it at that time and we usually read practically everything she signed. He did state at that time, in fact he has stated that the insurance was turned over to his daughter and the only thing he had left, outside of the Twin Lakes property, was the stock which he wanted turned over to his wife. Q. I will show you Respondent's Exhibit No. 1, and ask you if that is a copy of the instrument that you mentioned? A. That is right. Q. Did you see that signed by William Macgale? A. I saw it signed and I read it before it was signed. Appellant's counsel did not cross-examine the witness as to show the relationship of Louise Kirchner and the defendant to William Macgale. Mrs. Schmitzer testified that on May 23, 1931, "my uncle asked us to come over to his Twin Lakes home because he was very anxious to divide the property that the Macgale Ice Company owned and also to make arrangements for his wife, Martha Macgale, to receive the money due on the stock of the Macgale Ice Company. He said that his daughter was getting all of his life insurance policies and he wanted her to get whatever money was due on the stocks of the Macgale Ice Company. Q. He wanted her to get them. Who do you mean by 'her'? A. Martha Macgale, his wife. Q. What was done? A. A paper was drawn up, which my husband read and my mother signed on May 23, 1931. Q. I will show you this document, Respondent's Exhibit No. 1, and I ask you to say whether this was the paper that was signed? A. Yes, this is my mother's signature. * * * Mr. Mahoney [attorney for appellant]; No cross examination. Appellant testified that on May 1, 1931, the 3,443 shares of stock of the Macgale Ice Company were "up as collateral at that time with the bank, together with his life insurance policies;" that she was the beneficiary in the life insurance policies; that she knew her father owned the stock because it was up with the bank with the life insurance policies as collateral; that she did not know, personally, that the stock "was up with the bank," and she learned that from the bank of

her father.

Whether we decide the question involved in this appeal solely by interpreting the instrument dated May 22, 1931, or by interpreting that instrument in the light of the oral evidence as to what transpired at the time of the execution of the instrument, our decision of the question involved would be the same, viz., that William Maegele at the time in question divested himself of all interest in the stock in question and assigned his interest in the stock to his wife. To hold otherwise would be to defeat the plain intent of Maegele. We do not deem it necessary to decide whether the assignment is legal or equitable in its nature. "The doctrine is well settled, that courts of law will recognize and protect the rights of the assignee of a chose in action, whether the assignment be good ^{at} law or in equity only." (Morris v. Cheney, 51 Ill. 451, 454. See, also, Savage v. Gregg, 150 Ill. 161, 168.) Other cases to the same effect might be cited if it were necessary. That probate courts have equitable jurisdiction in matters pertaining to the administration of estates, see the opinion of Mr. Justice Wilson in In re Estate of Kinsey, 261 Ill. App. 481, 487, where the rule is stated and cases are cited in support of it.

In support of her argument that Maegele, by the instrument in question, merely intended to bring about an assignment of the stock to appellee in the future, appellant states in her brief: "While the stock was so deposited as collateral, David S. Morwich, the trustee for the corporation, proceeded to liquidate its assets and to distribute the proceeds. The pro rata portion due on the 3443 shares deposited as collateral was paid to William H. Maegele during his lifetime, and after his death, the cash accruing was paid to Martha Maegele on the theory that the stock had been assigned to her by the instrument above set forth including the proceeds of insurance on the life of William H. Maegele payable to the corporation." (Italics ours.) The alleged fact stated in the italicized part of the foregoing is not sustained by the record. Turning to

her father.

Whether we decide the question involved in this appeal solely by interpreting the instrument dated May 22, 1911, or by interpreting that instrument in the light of the oral evidence as to what transpired at the time of the execution of the instrument, our decision of the question involved would be the same, viz., that William Macgale at the time in question divested himself of all interest in the stock in question and assigned the interest in the stock to his wife. We hold otherwise would be to defeat the plain intent of Macgale. We do not deem it necessary to decide whether the assignment is legal or equitable in its nature. "The doctrine is well settled, that courts of law will recognize and protect the rights of the assignee of a chose in action, whether the assignment be good law or in equity only." (Morris v. Gurney, 21 Ill. 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

the page of the record that appellant cites in support of the statement, we find that Norwich testified: "I had to pay over to William Haegeler two dollars per share on the 3443 shares * * *. I paid that to him as a stockholder." It appears from the record, however, that Norwich, when he made the above statement, was referring to a time prior to the date of the execution of the instrument in question and when he, as trustee, was engaged in liquidating the corporation. He testified, as heretofore stated, that the corporation was practically liquidated on May 1, 1931, that then "all the assets that remained were a few dollars that we were trying to collect on the accounts receivable." The instrument in question was not signed until May 22, 1931.

The decision of a motion of appellee to dismiss this appeal was reserved to the hearing. The motion will be denied.

The judgment of the Circuit court of Cook county should be and it is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

the date of the record that appellant acted in support of the
statement, as this was made by the appellant. I did not pay any
William Heckele two dollars per share on the 24th of May, 1931.
I said that to him as a stockholder. It appears from the record,
however, that Horwich, when he made the above statement, was not acting
in a time prior to the date of the execution of the instrument in
question and when he, as a witness, was sworn in the testimony of
corporation. He testified, as heretofore stated, that the propo-
sition was practically liquidated on May 2, 1931, and that the
same was paid with a few dollars that he was given to
collect on the account receivable. The instrument in question
was not signed until May 22, 1931.
The decision of a motion of appeal to dismiss this appeal
was reserved to the hearing. The motion will be denied.
The judgment of the Circuit Court of Cook County shall
be and it is affirmed.

Witness my hand and official seal this 1st day of May, 1931.

41142

THE PEOPLE OF THE STATE OF ILLINOIS
ex rel. CHARLES J. MacGOWAN,

Appellee,

v.

THE CHICAGO PARK DISTRICT, a
Municipal Corporation,

Appellant.

APPEAL FROM SUPERIOR

COURT OF COOK COUNTY.

307 I.A. 383²

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The People, plaintiff, ex rel. Charles J. MacGowan, brought a mandamus suit against the Chicago Park District, a municipal corporation, defendant, seeking a writ of mandamus commanding defendant to pay to relator the sum of \$500, which he claims is due him as the balance of his salary as superintendent of employment of the West Chicago Park Commissioners for the period from July 1, 1932, to April 30, 1933. After a trial by the court judgment was entered ordering that a writ of mandamus issue directed to the Board of Commissioners of the Chicago Park District commanding them to meet as the Board of Commissioners and to pass such legislation as may be necessary to provide for the immediate payment to relator of the sum of \$500 and to do any and all things which may be necessary to be done to enable relator to be paid said sum by defendant. Defendant appeals.

Plaintiff filed an appearance in this court and after defendant had filed its brief we allowed plaintiff, upon its motions, two extensions of time in which to file its brief, but it failed to file one. The able and experienced counsel of the relator has apparently abandoned the defense of the judgment.

The petition, in substance, alleges the creation of the West Chicago Park Commissioners; the adoption of the Act relating to Civil Service in Park Systems and the creation of a Civil Service Board of the said Commissioners under said Act; the adoption on April 27, 1927, by the said commissioners of a resolution appointing relator superintendent of employment of

11111

THE PEOPLE OF THE STATE OF ILLINOIS
vs. CHARLES J. WOODSON

STATE'S ATTORNEY

CLERK OF THE COURT

307 L.A. 888

THE CHICAGO PARK DISTRICT
MUNICIPAL CORPORATION

CHICAGO, ILL.

MR. JUSTICE SEAMAN DELIVERED THE OPINION OF THE COURT.

The People, Plaintiff, ex rel. Charles J. Woodson,

brought a mandamus suit against the Chicago Park District, a

municipal corporation, defendant, seeking a writ of mandamus

commanding defendant to pay to relator the sum of \$700, which

he claims is due him as the balance of his salary as superin-

tendent of employment of the West Chicago Park Commissioners for

the period from July 1, 1932, to April 30, 1933. After a trial

by the court judgment was entered ordering that a writ of mandamus

issue directed to the Board of Commissioners of the Chicago Park

District commanding them to meet as the Board of Commissioners

and to pass such legislation as may be necessary to provide for

the immediate payment to relator of the sum of \$700 and to do any

and all things which may be necessary to be done to enable relator

to be paid said sum by defendant. Defendant appeals.

Plaintiff filed an appearance in this court and after

defendant had filed its brief we allowed plaintiff, upon its motion,

two extensions of time in which to file its brief, but it failed to

file one. The able and experienced counsel of the relator has

apparently abandoned the defense of the judgment.

The petition, in substance, alleges the creation of the

West Chicago Park Commissioners; the adoption of the Act relating

to Civil Service in Park Systems and the creation of a Civil

Service Board of the said Commissioners under said Act; the

adoption on April 17, 1933, by the said Commissioners of a

resolution appointing relator superintendent of employment of

the Board of West Chicago Park Commissioners for a period of six years at an annual salary of \$6,000; the assumption of the duties of the position by relator on April 28, 1927; the adoption of a resolution on June 30, 1932, by said commissioners directing the Civil Service Board to place in effect on July 1, 1932, a wage reduction of approximately ten per cent as to all employees except certain union employees whose wages had been previously reduced in the same proportion; that as a result of the said adoption relator's salary was reduced ten per cent for the period from July 1, 1932, to April 30, 1933; that the West Chicago Park Commissioners did not pay relator his salary as provided in the resolution appointing him and that on April 30, 1933, they owed him \$500. The petition then alleges the creation of the Chicago Park District and its coming into legal existence on May 1, 1934; alleges that relator requested the commissioners of the Chicago Park District to pay him the alleged balance due on his salary and their refusal to do so; alleges that as said superintendent relator was a municipal officer within the meaning of Section 11, Article 9, of the Illinois Constitution of 1870, and that his salary could not be reduced during his term of office; that he had ^avested and property right in the same of which he was unlawfully and arbitrarily deprived by the unlawful act of the commissioners of West Chicago Park District; that the Chicago Park District has now and always had sufficient available funds out of which to pay relator.

The amended answer of defendant, Chicago Park District, is a lengthy one, but in our view of this appeal it is only necessary to refer to the parts of the answer wherein laches and estoppel are raised. The answer alleges that relator is guilty of laches; that he accepted the reduced salary from July 1, 1932, to April 30, 1933, without protest, took no action against the West Chicago Park Commissioners to restore the salary; permitted said commissioners to go out of existence May 1, 1934, without making any demand on them or taking any action in reference to the salary; that after the

the Board of West Chicago Park Commissioners for a period of six years at an annual salary of \$6,000; the assumption of the duties of the position by relator on April 30, 1932; the adoption of a resolution on June 30, 1932, by said commissioners directing the Civil Service Board to place in effect on July 1, 1932, a wage reduction of approximately ten per cent as to all employees except certain union employees whose wages had been previously reduced in the same proportion; that as a result of the said adoption relator's salary was reduced ten per cent for the period from July 1, 1932, to April 30, 1933; that the West Chicago Park Commissioners did not pay relator his salary as provided in the resolution appointing him and that on April 30, 1933, they owed him \$200. The petition then alleges the creation of the Chicago Park District and its coming into legal existence on May 1, 1934, alleges that relator requested the commissioners of the Chicago Park District to pay him the alleged balance due on his salary and their refusal to do so; alleges that as said superintendent relator was a municipal officer within the meaning of Section 11, Article 9, of the Illinois Constitution of 1870, and that his salary could not be reduced during his term of office; that he had ²vested and properly right in the same of which he was unlawfully and arbitrarily deprived by the unlawful act of the commissioners of West Chicago Park District; that the Chicago Park District has now and always had sufficient available funds out of which to pay relator.

The amended answer of defendant, Chicago Park District, is a lengthy one, but in our view of this appeal it is only necessary to refer to the parts of the answer wherein laches and estoppel are raised. The answer alleges that relator is guilty of laches; that he accepted the reduced salary from July 1, 1932, to April 30, 1933, without protest, took no action against the West Chicago Park Commissioners to restore the salary; permitted said commissioners to go out of existence May 1, 1934, without making any demand on them or taking any action in reference to the salary; that after the

Chicago Park District came into existence on May 1, 1934, relator waited until June 30, 1937, a period of three years, before filing this petition, and waited until November 30, 1937, before he caused summons to be issued; alleges that the petition sets forth no facts excusing failure to file the petition earlier or justifying the delay; alleges that since the occurrences in question the West Chicago Park Commissioners ceased to exist and were superseded by the Chicago Park District; that payment of the money claimed would create confusion and disorder and disarrange public service by reason of delay, lapse of years and change of circumstances; that conditions existing in 1933 in reference to the corporate structure of the West Chicago Park Commissioners have ceased to exist; that the action requested would cause confusion in the handling of funds of the Chicago Park District; that no demand was made by relator upon defendant prior to the filing of the petition; that no facts are alleged showing a legal duty of defendant to perform the acts sought to be performed nor by whom the acts requested should be performed and whether such acts can be legally performed by such persons; that defendant has no funds in its possession from which relator can be legally paid; that relator voluntarily accepted the reduced salary during the period in question and by his action he waived his right to said additional amount; that the resolution of June 30, 1932, by the West Chicago Park Commissioners requested and did not direct the Civil Service Board to put said wage reduction into effect; that relator was a member of the said Civil Service Board and its secretary; that at a meeting of the said board held on July 28, 1932, at which relator was present and acted as secretary, the letter from the commissioners and the resolution adopted by the commissioners requesting the wage reduction was read and the members of the said board, including relator, voted to enforce and put into effect the reduction as requested, and directed relator as superintendent of employment to put said policy into effect; that relator, as said superintendent, put said policy into effect, reducing the pay of

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 this petition, and waited until November 30, 1937, before he caused
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 legally paid; that relator voluntarily accepted the reduced salary
 during the period in question and by his action he waived his right
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 superintendent, put said policy into effect, reducing the pay of

all employees, including relator, ten per cent; that during the period from July 1, 1932, to April 30, 1933, relator certified the pay rolls as to correctness, as required by the provisions of the Civil Service Act, showing the salaries of all employees, including his salary, in the amounts so reduced, and he certified to the correctness of the pay rolls in said amounts.

A number of points are made and strenuously argued by defendant in support of its contention that the judgment of the trial court should be reversed, but in our view of this appeal it is only necessary to consider two of the points: (1) "The plaintiff is guilty of such laches as bars his right to the relief sought." (2) "The plaintiff is estopped by his own action from claiming the monies alleged to be due him." These two points are so clearly meritorious that it is not difficult to understand why the relator abandoned the defense of the judgment.

The West Chicago Park Commissioners ceased to exist on April 30, 1934, and on May 1, 1934, the Chicago Park District came into existence. On April 28, 1927, the West Chicago Park Commissioners appointed relator superintendent of employment of said commissioners for a period of six years, at a salary of \$6,000 per year. The Civil Service Board of the said commissioners consisted of one James, who was also a Park Commissioner and president of the board; one Roehler, also a Park Commissioner, and relator. Relator was secretary of the Civil Service Board. On June 30, 1932, because of the great depression and the conditions resulting therefrom, and in the interest of economy, the commissioners of the West Chicago ^{Park} District passed a resolution requesting the said Civil Service Board to reduce the pay of all officers and employees ten per cent. On July 28, 1932, at a special meeting of the Civil Service Board, which was attended by James and relator, a resolution was presented to the said board reducing the pay of all officers and employees ten per cent, except in the case of certain union employees, who had had their pay previously reduced. James and

all employees, including relator, ten per cent; that during the period from July 1, 1932, to April 30, 1933, relator certified the pay rolls as to correctness, as required by the provisions of the Civil Service Act, showing the salaries of all employees, including his salary, in the amounts so reduced, and he certified to the correctness of the pay rolls in said amounts.

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relator voted in favor of the resolution and it was passed. The resolution also directed relator, as superintendent of employment, to put the salary reduction into effect. The minutes of this meeting are signed by relator as secretary and upon the witness stand he admitted the correctness of the minutes. After the said special meeting relator proceeded to carry the resolution into effect and directed the department heads to reduce the pay of all employees ten per cent. Relator was head of the Civil Service Department and in such capacity reduced the salaries of all persons in his department, including his own, ten per cent. He received and accepted salary checks in the reduced amount for the balance of the period of his appointment, viz., from July 1, 1932, to April 30, 1933. On each salary check was a statement to the effect that the check was payment in full for salary up to and including the date specified on the check. Relator accepted the checks in payment of his salary and indorsed and cashed them. In accordance with the requirements of the Act relating to Civil Service in Park Systems he certified to the correctness of the pay rolls of the Park District, which pay rolls included his own salary in the reduced amount. The instant suit was not filed until June 30, 1937, which was three years and two months after the West Chicago Park Commissioners had ceased to exist. During the period in question relator took no legal action in regard to his pay. It would be difficult to imagine a stronger case of laches and estoppel against a relator than is present in the instant suit. We have heretofore passed upon several cases (People ex rel. Mulvey v. City of Chicago, 292 Ill. App. 589; Anderson v. Sanitary Dist. of Chicago, 304 Ill. App. 259, abstract opinion) in which we held that the demands made upon certain municipal corporations were so unconscionable in their nature that the issuance of the writ of mandamus would work a grave injustice to the said corporations. In our opinion the instant claim is far more unconscionable than were the claims in the Mulvey and Anderson cases.

The judgment of the Superior court of Cook county is reversed.
JUDGMENT REVERSED.
Friend, P. J., and Sullivan, J., concur.

The resolution was passed in favor of the resolution and it was passed. The
 resolution also directed the relation, as an amendment of employment,
 to put the salary reduction into effect. The minutes of this
 meeting are signed by the relation as secretary and upon this witness
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 case of laches and estoppel against a relation than is present in
 the instant suit. We have heretofore passed upon several cases
 (People ex rel. Sullivan v. City of Chicago, 282 Ill. App. 387;
 People ex rel. Sullivan v. City of Chicago, 304 Ill. App. 379; abstract
 opinion) in which we held that the demands made upon certain
 municipal corporations were so unconscionable in their nature that
 the issuance of the writ of mandamus would work a grave injustice
 to the said corporations. In our opinion the instant claim is
 the more unconscionable than were the claims in the Sullivan and
 Sullivan cases.
 The judgment of the superior court of Cook County is reversed.
 THOMAS J. SULLIVAN, J., concur.
 THOMAS J. SULLIVAN, J., concur.

41290

GEORGE J. SCHMELEZER,
Appellee,

v.

THOMAS J. KELLEY,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

307 I.A. 384

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff filed an action of forcible detainer against defendant. The case was tried by the court without a jury and there was a finding that defendant was guilty of unlawfully withholding from plaintiff the possession of the premises and that the right to the possession of the premises was in plaintiff. Defendant appeals from a judgment entered upon the finding.

Defendant obtained possession of the premises under a written lease dated December 14, 1938, for a term of one year beginning January 1, 1939, and ending December 31, 1939, at a rental of \$25 per month from January 1 to March 31, and \$50 per month from April 1 to December 31, 1939. The premises consist of certain vacant lots, and the lease provides that they were to be occupied by defendant for the sale of used automobiles.

We do not often find an appeal so devoid of merit as the instant one. Defendant's counsel constantly objected to questions put by plaintiff's attorney, and it was difficult to obtain from defendant's counsel the theory of the defense. After a careful reading of the transcript of the evidence we find that defendant's counsel made two points in support of his contention that there should be a finding for defendant. The first was that the written lease between the parties was not admissible because it violated the statute of frauds. There was not the slightest merit in the point and it has not been urged in this court. The second point urged was that plaintiff's evidence showed that a hold-over tenancy had been created in favor of defendant. That point was also without the

3871A-384
 COURT OF APPEALS
 THOMAS L. ELLIST
 JUDGE

MR. JUSTICE GORMAN DELIVERED THE OPINION OF THE COURT.

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defendant. The case was tried by the court without a jury and
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 statute of frauds. There was not the slightest merit in the point
 and it has not been urged in this court. The second point urged was
 that plaintiff's evidence showed that a hold-over tenancy had been
 created in favor of defendant. That point was also without the

slightest merit and has not been urged here. Defendant, after he had been served, on December 3 or 4, 1939, with a notice to vacate, attempted to create a hold-over tenancy by mailing to plaintiff a check on which he had indorsed: "Payment for rent of lot at 4747 W. Madison St for month of January 1940," but plaintiff refused to accept the check and immediately returned it by registered mail to defendant. Defendant refused to receive the registered letter and it was returned by the post-office department to the sender, plaintiff. In the trial court, defendant's counsel, in support of his argument that a hold-over tenancy had been created, made the far-fetched point that plaintiff had failed to tender to defendant in open court the check and therefore a hold-over tenancy had been created. Defendant in this court contends: (1) "Where premises have been leased to a prospective tenant, who is unable to obtain possession by reason of a former tenant holding over after his term expired, the right to maintain the action vests in the new tenant alone," and (2) that it was "incumbent on the plaintiff to prove that the defendant was in actual possession of the premises at the time the suit was instituted." Neither of these points was urged or presented in the trial court and under the settled rule they cannot be raised here for the first time. We may say, however, that there is no merit in either point. There was no evidence that a lease was ever made by plaintiff to a prospective tenant. The only basis for point (1) is the testimony of defendant that in 1940 he called up the home telephone of plaintiff and plaintiff's wife told him that they had rented the place, in November, to someone else, and that on December 3 or 4, 1939, plaintiff told him that he had rented the place to someone else. The burden of proof was on defendant to show that someone other than plaintiff was entitled to the possession of the premises at the time of the commencement of this action, and his testimony utterly fails in that regard. As plaintiff argues, even if this testimony of defendant were believed, and if it were assumed that plaintiff had rented the premises to

slightest merit and has not been urged here. Defendant, after he had been served, on December 3 or 4, 1939, with a notice to vacate, attempted to create a hold-over tenancy by mailing to plaintiff a check on which he had indorsed: "Payment for rent of lot at 4747 W. Madison St for month of January 1940," but plaintiff refused to accept the check and immediately returned it by registered mail to defendant. Defendant refused to receive the registered letter and it was returned by the post-office department to the sender, plaintiff. In the trial court, defendant's counsel, in support of his argument that a hold-over tenancy had been created, made the far-fetched point that plaintiff had failed to tender to defendant in open court the check and therefore a hold-over tenancy had been created. Defendant in this court has argued that he was unable to obtain possession by reason of a former tenant holding over after his term expired, the right to maintain the action vests in the new tenant alone," and (2) that it was "incumbent on the plaintiff to prove that the defendant was in actual possession of the premises at the time the suit was instituted." Neither of these points was urged or presented in the trial court and under the settled rule they cannot be raised here for the first time. We may say, however, that there is no merit in either point. There was no evidence that a lease was ever made by plaintiff to a prospective tenant. The only basis for point (1) is the testimony of defendant that in 1940 he called up the home telephone of plaintiff and plaintiff's wife told him that they had rented the place, in November, to someone else, and that on December 3 or 4, 1939, plaintiff told him that he had rented the place to someone else. The burden of proof was on defendant to show that someone other than plaintiff was entitled to the possession of the premises at the time of the commencement of this action, and his testimony utterly fails in that regard. As plaintiff argues, even if this testimony of defendant were believed, and if it were assumed that plaintiff had rented the premises to

someone other than defendant, such tenancy might have commenced at a later period than the time of the commencement of this action. The trial court, in view of the character of the defense, might well have refused to believe this testimony of defendant. His attempt to create a hold-over tenancy after he had been served with a notice to vacate tends to show that he would resort to any expedient to hold possession of the premises. Point (2) is a bold contention, in view of the fact that defendant's counsel, in the trial court, argued that defendant was a hold-over tenant. Furthermore, defendant took the stand in his own behalf and his able and adroit counsel failed to ask him a single question on the subject as to who was in possession of the premises at the time of the commencement of the suit, or at the time of the trial. As plaintiff's counsel argues, the manner in which this suit has been fought is a strong circumstance tending to show that defendant is still in possession. As the trial court stated, the defendant would not be defending the suit if he were not in possession of the premises.

The defense to plaintiff's suit has been a technical one from the start of the proceedings. There is no merit in this appeal and the judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

someone other than defendant, such tenancy might have commenced at a later period than the time of the commencement of this action. The trial court, in view of the character of the defense, might well have refused to believe this testimony of defendant. His attempt to create a hold-over tenancy after he had been served with a notice to vacate tends to show that he would resort to any expedient to hold possession of the premises. Point (2) is a bold contention, in view of the fact that defendant's counsel, in the trial court, argued that defendant was a hold-over tenant. Furthermore, defendant took the stand in his own behalf and his wife and child counsel failed to ask him a single question on the subject as to who was in possession of the premises at the time of the commencement of the suit, or at the time of the trial. As plaintiff's counsel argues, the manner in which this suit has been fought is a strong circumstance tending to show that defendant is still in possession. As the trial court stated, the defendant would not be retaining the suit if he were not in possession of the premises. The defense to plaintiff's suit has been a technical one from the start of the proceedings. There is no merit in this appeal and the judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

FRIDG, P. J., and GILLIVER, J., concur.

40623

MABEL C. WEIDEMANN,
Plaintiff,

v.

OLOF A. ANDERSON et al.,
Defendants.

LENA AKERBERG,
Appellee,

v.

JOHN S. VAN LOAN, ELSIE M.
VAN LOAN and IVOR JEFFREYS,
Appellants.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

307 I.A. 384²

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

By this appeal respondents John Van Loan, Elsie M. Van Loan and Ivor Jeffreys, seek to vacate an order entered upon the amended petition of Lena Akerberg, directing them to account for rents collected during the statutory period of redemption. Her petition was filed in the Superior court in this cause, which was a foreclosure proceeding entitled Weidemann v. Anderson, No. 573658.

Lena Akerberg's amended petition alleged substantially that she was the holder of a \$500 bond secured by the trust deed foreclosed in this cause; that on February 28, 1933, Milton Johnson was appointed receiver to collect the rents and make disbursements with reference to the property foreclosed herein; that on August 10, 1936, a decree was entered confirming the master's report of sale and distribution, which said decree also ordered that a deficiency judgment for \$33,253.98 be entered in favor of the plaintiff successor-trustee, that "the Receiver heretofore appointed in this cause be continued with all the rights and powers heretofore vested in and conferred upon him" and that "all moneys collected by and accrued to the said Receiver until the expiration of the statutory period of redemption be applied *** toward the payment of the deficiency;" that "on the first day of September, 1936, John S. Van Loan and Elsie M. Van Loan presented *** their sworn petition in and by which *** they

STATE OF NEW YORK
 COUNTY OF ALBANY
 JAMES A. VAN LEE, PLAINTIFF
 vs.
 JOHN E. VAN LEE, DEFENDANT
 Appellate

80714.384

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

By this appeal respondents John Van Lee, Marie M. Van Lee and Iver Jellings, seek to vacate an order entered upon the amended petition of James A. Van Lee, directing them to account for rents collected during the statutory period of redemption. The petition was filed in the superior court in this cause, which was a foreclosure proceeding entitled *James A. Van Lee v. Anderson, No. 27302*. James A. Van Lee's amended petition alleged substantially that she was the holder of a \$500 bond secured by the first deed foreclosed in this cause; that on February 28, 1935, Milton Johnson was appointed receiver to collect the rents and make disbursements with reference to the property foreclosed herein; that on August 10, 1936, a decree was entered confirming the master's report of sale and distribution, which said decree also ordered that a deficiency judgment for \$33,253.98 be entered in favor of the plaintiff successor trustee, that "the Receiver heretofore appointed in this cause be continued with all the rights and powers heretofore vested in and conferred upon him" and that "all moneys collected by and accrued to the said Receiver until the expiration of the statutory period of redemption be applied to toward the payment of the deficiency;" that on the first day of November, 1936, John E. Van Lee and Marie M. Van Lee presented the said amended petition to said superior court.

stated to the court that they had acquired the equity of the property herein foreclosed and subsequently did redeem such property from the foreclosure sale *** and because of said redemption they asked the court for an order directing the Receiver, Milton Johnson, to turn over possession of said premises to them immediately;" that "by virtue of said sworn petition and statement of facts therein contained, namely, that a redemption had been made by said John S. Van Loan and Elsie M. Van Loan, an order was entered on the aforesaid first day of September 1936 *** requiring the Receiver to surrender immediate possession to said John S. Van Loan and Elsie M. Van Loan, and directing the said Receiver to file his final account and report within fifteen * * * days, said order of September 1, 1936, finding as a fact from the sworn petition of the said John S. Van Loan and Elsie M. Van Loan that they had redeemed said property from the foreclosure sale heretofore held in connection with the above proceeding;" and that "in accordance with said order, said Receiver Milton Johnson, did on the 29th day of September, 1936, file his final report and account for the period from March 1, 1935, to September 2, 1936, and did also turn over possession of said premises to said John S. Van Loan and Elsie M. Van Loan, by virtue of the order heretofore entered on the 1st day of September, 1936."

In her amended petition Lena Akerberg further alleged that an examination of the records in the office of the Recorder of Deeds of Cook county, as well as the files in this cause, disclosed that on July 31, 1936, the master, pursuant to the decree of foreclosure and sale theretofore entered in this cause, sold the property involved to one Ivor Jeffreys, to whom he issued a certificate of sale on the same day, which certificate was recorded August 14, 1936; that thereafter on May 4, 1938, there was issued to Ivor Jeffreys, purchaser at said sale, a master's deed, which was recorded on May 5, 1938; and that said Ivor Jeffreys became the owner of said premises by virtue of said master's deed.

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that said Ivor Jefferys became the owner of said premises by virtue
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with the above proceeding;" and that "in accordance with said order,
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property was ever made by John S. Van Loan and Elsie M. Van Loan or by any other person or persons and "that a fraud was perpetrated upon this honorable court by the petition of John S. and Elsie M. Van Loan fraudulently representing to the court that they had redeemed said property from foreclosure sale heretofore held in the above entitled cause and that by virtue and because of said fraudulent representations to this honorable court, the order of the 1st day of September, 1936, was procured;" that "because and by virtue of the fraudulent misrepresentation that said property had been redeemed by John S. Van Loan and Elsie M. Van Loan, the Receiver, Milton Johnson was on the 29th day of September, 1936, ordered to turn over the sum of One Hundred Forty-Five (\$145.00) Dollars, to said John S. and Elsie M. Van Loan and also the court was induced to order the balance on hand as shown by the Receiver's final report and account after the deduction of Receiver's fees and attorney's fees in the sum of Three Hundred Fifteen (\$315.00) Dollars [paid] on taxes delinquent against said property, which said payments were made after foreclosure sale and contrary to law;" and that "no report and account has been filed in this cause for the period from the 2nd day of September, 1936, to the 31st day of October, 1937, the end of the statutory period of redemption as provided for in the order entered on the 10th day of August, 1936."

The petition concluded with the prayer that the order of September 1, 1936, be vacated; that the Van Loans file within ten days their account and report for moneys collected by them from September 2, 1936, to October 31, 1937, when the period of redemption expired; that the Van Loans "reimburse this estate for the benefit of your petitioner and other bondholders similarly situated in this cause, the said sum of One Hundred Forty-Five (\$145.00) Dollars, fraudulently procured from this court by order of September 1, 1936;" that the Van Loans and Ivor Jeffreys or one or either of them "be directed to turn over to this honorable court the sum of Three Hundred Fifteen (\$315.00) Dollars, which this honorable court was induced to

property was ever made by John S. Van Loan and Elsie M. Van Loan or by any other person or persons and "that a fraud was perpetrated upon this honorable court by the petition of John S. and Elsie M. Van Loan fraudulently representing to the court that they had received said property from foreclosure sale hereof held in the above entitled cause and that by virtue and because of said fraudulent representations to this honorable court, the order of the 1st day of September, 1936, was procured" that "because and by virtue of the fraudulent misrepresentation that said property had been received by John S. Van Loan and Elsie M. Van Loan, the Honorable Milton Johnson was on the 19th day of September, 1936, ordered to turn over the sum of One Hundred Forty-Five (\$145.00) Dollars, to said John S. and Elsie M. Van Loan and also the court was induced to order the balance on hand as shown by the Receiver's final report and account after the deduction of Receiver's fees and attorney's fees in the sum of Three Hundred Fifteen (\$315.00) Dollars [paid] on said delinquent against said property, which said payments were made after foreclosure sale and contrary to law;" and that "no report and account has been filed in this cause for the period from the 2nd day of September, 1936, to the 31st day of October, 1937, the end of the statutory period of redemption as provided for in the order entered on the 19th day of August, 1936."

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pay on delinquent taxes as aforesaid, by virtue of the misrepresentation set forth in the petition of John S. Van Loan and Elsie M. Van Loan, heretofore referred to;" and that "upon the filing of such account and the turning over of all the aforesaid moneys, that this court might enter an order distributing same to the parties so entitled to same, among which is your petitioner."

Respondents filed a motion to dismiss the Akerberg amended petition, averring that it stated "no cause of action" against them, that the trial court was without jurisdiction of either the subject matter of the petition or of said respondents, and that petitioner was guilty of laches. The court having denied the motion to dismiss, respondents elected to stand upon said motion. The order from which this appeal is taken directed "that John S. Van Loan and Elsie M. Van Loan and Ivor Jeffreys, or either of them, file with this court within 10 days from the date of this order, their account and report for moneys received, collected or accrued to their benefit and disbursements made by them for the period from the 2nd day of September, 1936, the date to which the Receiver, Milton Johnson, has accounted, to the 31st day of October, 1937, the end of the statutory period of redemption."

Respondents' theory as stated in their brief is "that the court was without jurisdiction and that petitioner was guilty of gross laches;" and that "the amended petition showed no cause of action against the respondents or any of them."

Petitioner states her theory as follows: "Where all necessary steps have been taken to make possible the application of rents collected during the period of redemption, in reduction of a deficiency judgment the right to said rents being established by the trust deed and the decree, the discharge of the receiver and turning over of possession to redeeming defendants does not affect the right to have said rents applied on said deficiency. And where the order discharging the receiver and turning over possession was obtained by fraud, and without notice, so far as the record shows, the rights established by the decree remained unaffected by said order fraudulently obtained."

Was the order of September 1, 1936, removing the receiver

pay on delinquent taxes as aforesaid, by virtue of the misrepresentation set forth in the petition of John B. Van Loan and Elsie W. Van Loan, heretofore referred to; and that "upon the filing of such account and the turning over of all the aforesaid moneys, that this court might enter an order distributing same to the parties so entitled to same, among which is your petitioner."

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Petitioner states her theory as follows: "Where all necessary steps have been taken to make possible the application of rents collected during the period of redemption, in reduction of a delinquent judgment the right to said rents being established by the trust deed and the decree, the discharge of the receiver and turning over of possession to redeeming defendants does not affect the right to have said rents applied on said delinquency. And where the order distributing the moneys and turning over possession was obtained by fraud, and without notice, so far as the record shows, the rights established by the decree remained unaffected by said order fraudulently obtained."

Was the order of September 1, 1936, removing the receiver

and directing him to turn over the foreclosed premises to the respondents John S. Van Loan and Elsie M. Van Loan procured by fraud? That fraud was perpetrated on the court to secure the entry of this order must not only be conceded but it is admitted on the record. By their motion to dismiss the amended petition of Lena Akerberg respondents admitted all the facts well pleaded therein. But they argue in effect that the fraud indulged in by them is not the kind or character of fraud that may be held to vitiate the order removing the receiver. We think that it is and that such order was void from the date of its entry.

Just what is the situation presented? Ivor Jeffreys is an attorney. He was not a party to the foreclosure proceeding. He purchased the property involved for \$5,000 at the foreclosure sale and received the master's certificate of sale. The decree of August 10, 1936, confirming the master's report of sale and distribution, ordered a deficiency judgment of \$33,253.98 entered in favor of the plaintiff successor-trustee. The decree also ordered that the receiver, who had been theretofore appointed and who was in possession, continue in possession of the premises until the expiration of the period of redemption and that the net income received by him from said property be applied to the payment of the deficiency judgment. The receiver continued in possession of the premises until he was ordered to turn over the possession of same to the Van Loans on September 1, 1936. This order was procured by the Van Loans by the fraudulent representation in their petition that they had redeemed the property from the foreclosure sale. Thereafter, at the expiration of the period of redemption, the master's deed was issued to Attorney Ivor Jeffreys, the purchaser at the foreclosure sale, which demonstrated conclusively that the property had not been redeemed by the Van Loans or any one else. The record discloses that Ivor Jeffreys as the attorney for the Van Loans procured the entry of the order of September 1, 1936, removing the receiver and turning the property over to the Van Loans. Upon the hearing on respondents' motion to dismiss the Akerberg amended petition,

and directing him to turn over the foreclosed premises to the respondents John S. Van Loan and Eliza M. Van Loan procured by fraud that fraud was perpetrated on the court to secure the entry of this order must not only be conceded but it is admitted on the record. By their motion to dismiss the amended petition of Isaac Albersberg respondents admitted all the facts well pleaded therein. But they argue in effect that the fraud indulged in by them is not the kind or character of fraud that may be held to vitiate the order removing the receiver. We think that it is and that such order was void from the date of its entry.

Just what is the situation presented? Ivor Jelliffe is an attorney. He was not a party to the foreclosure proceeding. He purchased the property involved for \$5,000 at the foreclosure sale and received the master's certificate of sale. The decree of August 10, 1936, confirming the master's report of sale and distribution, ordered a deficiency judgment of \$33,273.98 entered in favor of the plaintiff successor-trustee. The decree also ordered that the receiver, who had been therefore appointed and who was in possession, continue in possession of the premises until the expiration of the period of redemption and that the net income received by him from said property be applied to the payment of the deficiency judgment. The receiver continued in possession of the premises until he was ordered to turn over the possession of same to the Van Loans on September 1, 1936. This order was procured by the Van Loans by the fraudulent representation in their petition that they had redeemed the property from the foreclosure sale. The master's deed was issued to Attorney Ivor Jelliffe, the purchaser at the foreclosure sale, which demonstrated conclusively that the property had not been redeemed by the Van Loans or any one else. The records disclose that Ivor Jelliffe is the attorney for the Van Loans procured the entry of the order of September 1, 1936, removing the receiver and turning the property over to the Van Loans. Upon the hearing on respondents' motion to dismiss the Albersberg amended petition,

Attorney Jeffreys, who represented the Van Loans as well as himself in the trial court in the instant proceeding and is the attorney for all the respondents on this appeal, made the following statement: "Counsel has introduced a petition here on the part of the Van Loans to turn the property over to them, upon which an order was entered that the property be turned over to them and that the receiver be discharged. *** Although I did not present that petition, I sat in the back part of the room. *** I didn't present the petition but I heard it. I was in court." This statement was made despite the fact that the record shows that on the reverse side of the order of September 1, 1936, removing the receiver upon the Van Loan's petition of the same date, appears the name "Ivor Jeffreys" as solicitor for the Van Loans. This being so it is fair to assume that Attorney Jeffreys not only prepared said order but that he prepared and presented the petition upon which it was predicated. When that petition was sworn to by the Van Loans they knew that it was false since they had not redeemed the property. When Ivor Jeffreys, their attorney, prepared and presented that petition, he knew that the Van Loans had not redeemed the property from the foreclosure sale. If they had, necessarily he must have known, since he was the purchaser at the master's sale, and received the master's certificate and the money paid to redeem would have been received by him.

When the petition of the Van Loans containing the sworn false and fraudulent allegation that they had redeemed the property was presented to the court, they thereby asked the court to take jurisdiction over them and the subject matter of their petition. Had the true state of facts been presented to the court the Van Loans would have had no place in this proceeding. They induced the court by their fraudulent petition to take merely colorable jurisdiction over them. Having done so, any order secured by them was a nullity. An order, judgment or decree obtained by fraud will be set aside by a court of equity at any time. Where, as here, the motion to dismiss admits the fraud alleged in the amended petition, it is mandatory on the court to

Attorney Jefferys, who represented the Van Loans as well as himself in the trial court in the instant proceeding and is the attorney for all the respondents on this appeal, made the following statement:

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When the petition of the Van Loans containing the sworn false and fraudulent allegations was presented to the court by their attorney, they thereby asked the court to take jurisdiction over them and the subject matter of their petition. Had the court at that time been presented to the court the Van Loans would have had no place in this proceeding. They induced the court by their fraudulent petition to take merely colorable jurisdiction over them. Having done so, any order secured by them was a nullity. An order, judgment or decree obtained by fraud will be set aside by a court of equity at any time. Here, as here, the motion to dissolve should be granted alleged in the amended petition, it is mandatory on the court to

vacate and set aside the order procured by fraud upon the court and the bondholders. In passing upon a somewhat similar situation in Reisman v. Central Mfg. Dist. Bank, 296 Ill. App. 61, this court said at pp. 66 and 67:

"It is next urged by petitioners that a judgment or decree obtained by fraud will be set aside by a court of equity at any time, and where the motion to strike admits the fraud, it is mandatory upon the court to vacate and set aside the order thus procured. The petition herein alleges facts which constitute fraud and the authorities in this state and elsewhere have consistently approved the maxim that fraud vitiates every transaction into which it enters and is applicable to judgments so procured. In Nelson v. Rockwell, 14 Ill. 375, it was held that (p. 376) 'a fraudulent judgment is void in equity as it regards the party defrauded, and cannot therefore preclude the exercise of equitable jurisdiction.'

"In Elting v. First National Bank, 173 Ill. 368, it was said (p. 391): 'When a judgment has been obtained by fraud, it is a mere nullity, and it may be attacked on account of the fraud in a collateral proceeding, and equity has jurisdiction to cancel and set aside such a judgment.'

"In Moore v. Sievers, 336 Ill. 316, the court (p. 322) reiterated the rule as follows: 'A court of equity has always the power to grant relief against judgments and decrees obtained by fraud and this power will be exercised to prevent the enforcement of a judgment or decree which is against conscience *** (Farwell v. Great Western Telegraph Co., 161 Ill. 522; Elting v. First Nat. Bank, 173 Ill. 368; Atlas Nat. Bank v. More, 152 Ill. 528; King v. Little, 267 Ill. 20.)'

"In Johnson v. Waters, 111 U. S. 640, the court gave its approval to this doctrine as follows: 'The most solemn transactions and judgments may, at the instance of the parties, be set aside or rendered inoperative for fraud *** The Court of Chancery is always open to hear complaints against it, whether committed in pais or in or by means of judicial proceedings. In such cases the court does not act as a court of review, nor does it inquire into any irregularities or errors of proceeding in another court; but it will scrutinize the conduct of the parties, and if it finds that they have been guilty of fraud in obtaining a judgment or decree, it will deprive them of the benefit of it, and of any inequitable advantage which they have derived under it.'"

It cannot be questioned that the decree of August 10, 1936, which directed the entry of the deficiency judgment, was a final determination of the right of the plaintiff successor-trustee, to have the rents and profits which accrued from the property during the entire period of redemption applied toward the payment of said deficiency judgment. This was true, even though the owners of the equity had actually redeemed the property. The order of September 1, 1936, removing the receiver and turning the possession of the premises over to the owners of the equity, did not, as respondents contend, authorize

the Van Loans to convert the rents and profits received from the property to their own uses and purposes. That order could not have intended any such result. In our opinion, assuming that the Van Loans had in fact redeemed the property, the only effect of the order of September 1, 1936, was to supplant the receiver by the Van Loans as the collecting agency of the rents, obligated just as the receiver was to account for said rents to the successor-trustee for the benefit of all of the bondholders.

Respondents invoke the doctrine of laches as a bar to the relief sought by the petitioner, Lena Akerberg. This doctrine has no application where the party acts diligently and within a reasonable time after the facts upon which the fraud is predicated have been disclosed. "However great the lapse of time, laches is not imputable to a party who had no knowledge of a judgment against him and it is only required of him to be diligent in seeking relief after he has notice of it." Cummer v. Cummer, 283 Ill. App. 220. We are in accord with the finding of the trial court that the petitioner was not guilty of laches. In any event parties who combine together, as did the respondents here, for the purpose of fraudulently procuring an order from the court, are precluded from relying on laches in a court of equity. (Messick v. Mohr, 292 Ill. App. 69; Greenman v. Greenman, 107 Ill. 404.)

We are impelled to hold that the trial court did not err in entering the order from which this appeal is taken; that said order directing an accounting by respondents merely enforced the rights of the bondholders as established by the decree of August 10, 1936; and that those rights remained unaffected by the void order of September 1, 1936, procured as it was by the respondent attorney Ivor Jeffreys upon the fraudulent sworn petition of the other respondents.

For the reasons stated herein the order of the Superior court is affirmed.

ORDER AFFIRMED.

Friend, P. J., and Scanlan, J., concur.

the Van Leons to convert the rents and profits received from the property to their own use and purposes, that order could not have intended any such result. In our opinion, assuming that the Van Leons had in fact redeemed the property, the only effect of the order of September 1, 1936, was to supplant the receiver by the Van Leons as the collecting agency of the rents, obligated just as the receiver was to account for said rents to the successor-trustee for the benefit of all of the bondholders.

Respondents invoke the doctrine of laches as a bar to the relief sought by the petitioners, Leona Kharber. This doctrine has no application where the party acts diligently and within a reasonable time after the facts upon which the claim is predicated have been disclosed. "However great the lapse of time, laches is not imputable to a party who had no knowledge of a judgment against him and is the only required of him to be diligent in seeking relief after he has notice of it." Central Y. Bldg. Co. v. City of New York, 283 Ill. App. 230. We are in accord with the finding of the trial court that the petitioners are not guilty of laches. In any event laches was pleaded and proven together, as the respondents here, for the purpose of fraudulently procuring an order from the court, are precluded from relying on laches in a court of equity. Central Y. Bldg. Co. v. City of New York, 283 Ill. App. 230. Central Y. Bldg. Co. v. City of New York, 283 Ill. App. 230. We are impelled to hold that the trial court did not err in

entering the order from which this appeal is taken; that said order directed an accounting by respondents merely enforced the rights of the petitioners as established by the decree of August 12, 1936; and that those rights remained unaffected by the void order of September 1, 1936, procured as it was by the respondent against their testimony upon the fraudulent sworn petition of the other respondents. For the reasons stated herein the order of the respondent court is affirmed.

41222

HAROLD PURNELL, doing business
as PURNELL STUCCO RECOATING CO.,
Appellee,

v.

THOMAS JONES and ELLEN JONES,
Appellants.

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

307 L.A. 385

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal by defendants, Thomas Jones and Ellen Jones, seeks to reverse a decree entered December 15, 1938, which ordered the foreclosure of a mechanic's lien upon the complaint of plaintiff, Harold Purnell, doing business as the Purnell Stucco Recoating Co. No brief has been filed by plaintiff.

Plaintiff's unsworn complaint filed June 24, 1938, alleged that he is engaged in the business of recoating stucco buildings; that June 11, 1936, defendants "authorized, permitted and directed" Vance and Gormley to order from him the necessary labor and materials to "dash-coat" the residence and garage of defendants at 918 Belleforte avenue, Oak Park, Illinois; that subsequently he submitted a written proposition to defendants to do the work for \$175, which they orally accepted, and that they approved and accepted the work when it was completed on July 18, 1936; that when the contract was entered into July 11, 1936, when the work was being done, when it was completed on July 18, 1936, and when the complaint was filed June 24, 1938, defendants were the owners in fee simple of the premises in question; and that on January 3, 1938, plaintiff filed a claim for a mechanic's lien and that he was entitled to a decree foreclosing his lien.

Defendants' answer denied that July 11, 1936, or at any other time they applied to plaintiff or authorized or permitted or directed Vance and Gormley to apply in their behalf to plaintiff to furnish the necessary labor and material alleged in the complaint; that plaintiff ever submitted to them any proposition in writing covering said work; that on July 11, 1936, or at any other time they

WILLIAM JONES, JR., Plaintiff,
vs.
HAROLD FURNELL, Defendant.

802 L.A. 385

THE JUDICIAL OFFICE DELIVERED THE OPINION OF THE COURT.

This appeal by defendant, Thomas Jones and Ellen Jones, seeks to reverse a decree entered December 12, 1938, which ordered the foreclosure of a mechanic's lien upon the complaint of plaintiff, Harold Furnell, doing business as the Furnell Stucco Restoring Co. No brief has been filed by plaintiff.

Plaintiff's own complaint filed June 24, 1938, alleges that he is engaged in the business of restoring stucco buildings; that June 11, 1936, defendants "authorized, permitted and directed" Jones and Gornley to enter upon his property located at 913 Bellefonte Avenue, Oak Park, Illinois; that subsequently he submitted a written proposition to defendants to do the work for \$175, which they orally accepted, and that they approved and accepted the work when it was completed on July 18, 1936; that when the contract was entered into July 11, 1936, when the work was being done, when it was completed on July 18, 1936, and when the complaint was filed June 24, 1938, defendants were the owners in fee simple of the premises in question; and that on January 3, 1938, plaintiff filed a claim for a mechanic's lien and that he was entitled to a decree foreclosing his lien. Defendants' answer denied that July 11, 1936, or at any other time they applied to plaintiff or authorized or permitted or directed Jones and Gornley to apply in their behalf to plaintiff to obtain the necessary labor and material alleged in the complaint; that plaintiff was indebted to them and requested in writing covering said work; that on July 11, 1936, or at any other time they

orally or otherwise accepted plaintiff's proposition to do the work; that at the time said contract was alleged to have been entered into or at the time said work was alleged to have been performed they were the owners in fee simple of the premises involved; that they at any time accepted the work alleged to have been performed by plaintiff in compliance with said contract or that they promised to pay \$175 for this work; or that they acknowledged at any time that the work and material in question was furnished for them.

The answer then averred that plaintiff did request defendant Thomas Jones to pay him \$175, but that such demand was made upon him for the first time approximately one year after the work was done; that defendants refused to pay said bill; that on October 28, 1937, suit was instituted by plaintiff against defendants on this same claim before a justice of the peace in Oak Park, Illinois; and that after a full hearing on the merits in that action plaintiff took a nonsuit on November 19, 1939, because of his failure to sustain his claim.

Plaintiff testified that "he had been acquainted with Vance and Gormley for some time and had done business with them, and that in July 1936 Vance gave him an order to do the work in question on the premises in question and stated that he would pay for the work when the house was sold;" that "he did the work and that the reasonable price therefor was \$175 and that he had not been paid for it;" and that he "knew Vance was not the owner of the premises."

On cross-examination plaintiff stated "that he did not communicate in any way with Jones relative to the work until about a year after the work was completed, when he heard that the building was sold, and then by telephone asked defendant to pay and defendant refused;" that he "had never met Jones or talked with him or corresponded with him or contacted him in any way until said last mentioned time; that he made no inquiry as to Jones; that he did not investigate the title to the premises and did not know whether or not Jones was the owner of record of the premises when the work was done; that he trusted Vance and Gormley * * * that he entered the charge on his books against Vance and Gormley; that he sent

orally or otherwise accepted plaintiff's proposition to do the work; that at the time said contract was alleged to have been entered into or at the time said work was alleged to have been performed they were the owners in fee simple of the premises involved; that they at any time accepted the work alleged to have been performed by plaintiff in compliance with said contract or that they promised to pay him for this work as they were alleged to have done.

The answer then averred that plaintiff had requested defendant Thomas Jones to pay him \$150, but that such demand was made upon him for the first time approximately one year after the work was done; that defendant refused to pay said bill; that on October 26, 1937, suit was instituted by plaintiff against defendant on this same claim before a justice of the peace in Oak Park, Illinois; and that after a full hearing on the merits in that action plaintiff took a nonsuit on November 12, 1937, because of his failure to establish his claim.

Plaintiff testified that he and some employees of the Vance and Gormley for some time and had done business with them; that in July 1936, Thomas gave him an order to do the work in question on the premises in question and stated that he would pay for the work when the house was sold; that he did the work and that the reasonable price therefor was \$150 and that he had not been paid for it; and that he "knew Vance was not the owner of the premises."

On cross-examination plaintiff stated "that he did not remember in any way with Jones relative to the work until about a year after the work was completed, when he heard that the building was sold, and then by telephone asked defendant to pay and defendant refused; that he had never met Jones or talked with him or communicated with him or contacted him in any way until said last mentioned time; that he made no inquiry as to Jones; that he did not investigate the title to the premises and did not know whether or not Jones was the owner of record at the premises when the work was done; that he testified Vance and Gormley * * * that he entered the charge on his books against Vance and Gormley; that he sent

repeated statements of this account to Vance & Gormley in their names *** that neither of the defendants was present at the time when he had his purported talk with Vance relative to this work."

Plaintiff introduced in evidence a certified copy of a deed to this property from Gladys J. Marx to defendants dated June 26, 1936, and recorded in the office of the Recorder of Deeds of Cook County, July 22, 1936.

William Vance, testifying in plaintiff's behalf, stated that "in 1936 he was a member of Vance & Gormley, real estate brokers;" that "he had known Thomas Jones, one of the defendants for some time;" that "he took Jones out to view the property in question and afterwards sold it to him;" that "the property needed restucco work and painting on the outside;" that Jones told him to have this work done; that he "talked with plaintiff Purnell in July 1936 and ordered the work to be done and was to be paid for when the house was sold;" that "the work was finished by plaintiff on July 18, 1936," and that "Jones bought the property for resale."

On cross-examination Vance testified that Jones told him to have the work done when he and Jones were at the building and at that time Jones had not signed the contract for the purchase of the property; that "under the contract Jones was to place a mortgage of \$5,500 on the premises;" and that he "told Jones that the FMA would not make the loan unless some restuccoing and repainting was done;" that "after Jones told him to have the work done Jones signed a contract for the purchase of the premises, which was dated May 23, 1936; that he "was not the owner of the premises but was the broker for one Marx;" that "the contract provided for a broker's commission to be paid by seller to Vance & Gormley *** in the amount fixed on the Chicago Real Estate Board's schedule of commissions;" that Jones paid him \$200 on the contract; that on August 1, 1936, Jones paid him \$100 more; that "on 'final settlement sheet' dated September 9, 1936, on premises in question, defendant Jones received check for \$643.25, brought to him by Vance as the balance of the loan of

repeated statements of this account to Vance & Gormley in their names *** that neither of the defendants was present at the time when he had his purported talk with Vance relative to this work."

Plaintiff introduced in evidence a certified copy of a deed to this property from Gladys J. Marx to defendants dated June 26, 1936, and recorded in the office of the Recorder of Deeds of Cook County, July 22, 1936.

William Vance, residing in Plaintiff's home, stated

that "in 1936 he was a member of Vance & Gormley, real estate brokers;" that "he had known Thomas Jones, one of the defendants for some time;" that "he took Jones out to view the property in question and afterwards sold it to him;" that "the property needed restreco work and painting on the outside;" that Jones told him to have this work done; that he "talked with Plaintiff Funnell in July 1936 and ordered the work to be done and was to be paid for when the house was sold;" that "the work was finished by Plaintiff on July 18, 1936," and that "Jones bought the property for resale."

On cross-examination Vance testified that Jones told him to have the work done when he and Jones were at the building and at that time Jones had not signed the contract for the purchase of the property; that "under the contract Jones was to place a mortgage of \$2,500 on the premises;" and that he "told Jones that the FHA would not make the loan unless some restrecoing and repainting was done;"

that "after Jones told him to have the work done Jones signed a contract for the purchase of the premises, which was dated May 23, 1936, that he "was not the owner of the premises but was the broker for one Marx;" that "the contract provided for a broker's commission to be paid by seller to Vance & Gormley *** in the amount fixed on the Chicago Real Estate Board's schedule of commissions;" that Jones paid him \$200 on the contract; that on August 1, 1936, Jones paid him \$100 more; that "on 'final settlement sheet' dated September 2, 1936, on premises in question, defendant Jones received check for \$23,250, payable to him by Vance as the balance of the loan of

\$5,500 and defendant indorsed same and turned it over to Vance for delivery to Marx;" that the witness "did not deliver said check to Marx but retained \$60 of this check and delivered to Marx his check for \$583.50;" that he and Marx had trouble as to the amount due the latter; and that he "knew that Jones paid Marx an additional sum of \$369.47 on March 18, 1937, before he was able to obtain possession of the premises."

During the course of Vance's testimony plaintiff identified certain exhibits which defendants later introduced in evidence. The first of these exhibits was a statement sent by plaintiff to Vance & Gormley for \$175 covering the cost of the work in question. Defendants' Exhibit 2 was their contract for the purchase of the property in which the price was fixed at \$5,800, \$300 of which was to be paid in cash and the balance by way of a loan of \$5,500. Defendants' Exhibit 3 was the receipt given by Vance & Gormley to Jones for the \$200 paid to Vance on the contract of purchase. This receipt recited that such payment was deposited on the purchase price of the premises "to be returned if contract of sale is not consummated in thirty days."

The following agreed statement as to the testimony of defendant Thomas Jones is quoted from the record: "He denied that he was the owner of the premises in question at or before the time the work in question was done; denied that he at any time had directed or authorized Vance to have the work in question done, or ever had any notice or knowledge that Vance had purported to have the work done for defendants or as their agent; denied that Vance was his agent; he intended to resell the place; he had been out to the place before he signed the contract and saw the condition of it; Vance stated that he would arrange for the mortgage with the FMA; at that time Vance told him that the FMA would require some stucco work to be done, to which Jones said nothing; that Vance told him he would have the work done but nothing was said about Jones paying for it or that it would be charged to Jones; that he knew the work was going on and saw the same; that he did not at any time inquire of Vance as to how Vance had

\$2,700 and defendant indeed came and turned it over to Vance for delivery to Mark; that the witness "did not deliver said check to Mark but retained \$20 of this check and delivered to Mark the check for \$282.50;" that he and Mark had trouble as to the amount due the latter; and that he "knew that Jones paid Mark an additional sum of \$362.47 on March 18, 1937, before he was able to obtain possession of the premises."

During the course of Vance's testimony plaintiff introduced certain exhibits which defendant later introduced in evidence. The first of these exhibits was a statement sent by plaintiff to Vance & Company for \$175 covering the cost of the work in question. Defendants' Exhibit 2 was their contract for the purchase of the property in which the price was fixed at \$2,700, 1000 of which was to be paid in cash and the balance by way of a loan of \$2,700. Defendants' Exhibit 3 was the receipt given by Vance & Company to Jones for the \$200 paid to Vance on the contract of purchase. This receipt recited that such payment was deposited on the purchase price of the premises "to be returned if contract of sale is not consummated as hereby agreed."

The following agreed statement as to the testimony of defendant Thomas Jones is quoted from the record: "He denied that he was the owner of the premises in question at or before the time the work in question was done; denied that he at any time had directed or authorized Vance to have the work in question done, or ever had any notice or knowledge that Vance had purported to have the work done for defendants or as their agent; denied that Vance was his agent; he intended to resell the place; he had been out to the place before he signed the contract and saw the condition of it; Vance stated that he would attempt to get the mortgage with the \$200; at that time Vance told him that the \$200 would require some other work to be done, to which Jones said nothing; that Vance told him he would have the work done but nothing was said about Jones paying for it or that it would be charged to Jones; that he knew the work was going on and saw the same; that he did not at any time indicate to Vance as to how Vance had

procured the premises to be restuccoed nor as to who did the work and said that he never received any notice of any kind from the plaintiff of his intention to do the work or that he had done the work or that he was looking to Jones for payment of the work until about a year after the work was completed, when plaintiff called him on the telephone and asked him to pay, and he declined to pay. He knew that Vance expected to resell the premises upon the usual commission."

The only question raised by the pleadings and necessary to be determined from the evidence was that of agency. When Vance of Vance & Gormley, the real estate brokers, entered into the contract with plaintiff for the performance of the work involved, did he do so as the authorized agent of defendants? There is no evidence in the record that even remotely tends to show that plaintiff relied upon any relationship of agency between Vance and the defendants at the time that he entered into the contract with Vance and performed the work.

According to plaintiff's testimony Vance, whom he knew, came to him, ordered the work done and said he would pay for it when the building was sold. Vance also testified that he ordered the work done and that it was to be paid for when the building was sold. Jones's name was not mentioned by Vance to Purnell. Plaintiff testified that he did not know Jones, had never heard of him and that he never had any business dealings with him. So far as plaintiff was concerned Jones was not in existence. Having made no investigation of the title to the premises he did not know whether Jones owned the property or had any interest in it. If he had investigated the title he would have found that Jones was not the owner of record of this property when the contract was made with Vance or when the work was completed July 18, 1936, the deed to defendants not having been recorded until July 26, 1936. Purnell charged this job on his books to Vance & Gormley and to them alone and he thereafter sent out statements to them requesting payment and to them only. He stated that he

procured the premises to be reassessed now as to who did the work and said that he never received any notice of any kind from the plaintiff of his intention to do the work or that he had done the work or that he was looking to Jones for payment of the work until about a year after the work was completed, when plaintiff called him on the telephone and asked him to pay, and he declined to pay. He knew that Vance expected to receive the premises upon the usual commission."

The only question raised by the pleadings and necessary to be determined from the evidence was that of agency. When Vance of Vance & Gormley, the real estate brokers, entered into the contract with plaintiff for the performance of the work involved, did he do so as the authorized agent of defendants? There is no evidence in the record that even remotely tends to show that plaintiff relied upon any relationship of agency between Vance and the defendants at the time that he entered into the contract with Vance and performed the work.

According to plaintiff's testimony Vance, whom he knew, came to him, ordered the work done and said he would pay for it when the building was sold. Vance also testified that he ordered the work done and that it was to be paid for when the building was sold. Jones's name was not mentioned by Vance to Russell. Plaintiff testified that he did not know Jones, had never heard of him and that he never had any business dealings with him. So far as plaintiff was concerned Jones was not in existence. Having made no investigation of the title to the premises he did not know whether Jones owned the property or had any interest in it. If he had investigated the title he would have found that Jones was not the owner of record of this property when the contract was made with Vance or when the work was completed July 18, 1936, the deed to defendants not having been recorded until May 26, 1936. Russell charged \$100 on his statement to Vance & Gormley and to them alone and he thereafter sent out statements to them requesting payment and to them only. He stated that he

trusted Vance & Gormley and that he did not communicate with Jones in any manner "until about a year after the work was completed."

The only evidence in the record upon which plaintiff relied to establish the fact that Vance was the agent of Jones in this transaction was the testimony of Vance that when he took Jones out to look at the property the latter told him to have "this work done." At that time Jones had not entered into the contract for the purchase of the property and, even after he had signed the contract of purchase, the consummation of the deal was contingent upon the acceptance by the then mortgagee of payment of the outstanding mortgage indebtedness in a reduced amount and the procurement by defendants of a FHA loan.

It is clear from plaintiff's own testimony that he told Mr. Vance as the agent of Vance & Gormley that he trusted Vance & Gormley, that he extended the credit to Vance & Gormley and that he looked solely to Vance & Gormley for payment. We think it was only as an afterthought and for some reason not apparent from the evidence that more than a year after the work was completed he sought to impose this obligation upon defendants. In our opinion plaintiff failed utterly to show any liability on defendants' part.

The decree in this cause, which awarded a sale of the premises in question, was entered without notice to defendants or their counsel and in their absence on December 15, 1939, and defendants' attorney had no knowledge of its entry until January 10, 1940.

On March 8, 1940, defendants presented a verified petition for leave to file a bill of review on the ground of "newly discovered evidence coupled with fraud." Said petition contained the following among other pertinent and material allegations:

"And your petitioners further represent, that since the rendition of said decree, your petitioners have discovered new matter of consequence in said cause, and particularly, that prior to the filing of the said claim for lien, the said plaintiff had executed and delivered to the Chicago Title & Trust Company a general waiver of the lien prayed for in said bill and awarded by said decree; that said waiver was addressed 'To all whom it may concern;' that a photostatic copy of said waiver of lien is hereto

...in any manner "until about a year after the work was completed."

The only evidence in the record upon which Plaintiff relied to establish the fact that Vance was the agent of Jones in this transaction was the testimony of Vance that when he took Jones out to look at the property the latter told him to have "this work done." At that time Jones had not entered into the contract for the purchase of the property and, even after he had signed the contract of purchase, the consummation of the deal was contingent upon the acceptance by the then mortgagees of payment of the outstanding mortgage indebtedness in a reduced amount and the procurement by defendants of a WA loan.

It is clear from Plaintiff's own testimony that he told Mr. Vance as the agent of Vance & Gormley that he trusted Vance & Gormley, that he extended the credit to Vance & Gormley and that he looked solely to Vance & Gormley for payment. We think it was only as an afterthought and for some reason not apparent from the evidence that more than a year after the work was completed he sought to impose this obligation upon defendants. It was obvious Plaintiff failed to act in good faith in this matter, which amounted to a sale of the premises in question, was entered without notice to defendants or their counsel and in their absence on December 12, 1939, and defendants' attorney had no knowledge of its entry until January 10, 1940. On March 6, 1940, defendants presented a verified petition for leave to file a bill of review on the ground of "fraud" discovered evidence coupled with fraud." Said petition contained the following

among other pertinent and material allegations:

"And your petitioners further represent, that since the rendition of said decree, your petitioners have discovered many matters of consequence in this cause, and particularly that your petitioners have discovered that the bill of review was filed on the 12th day of December, 1939, and delivered to the Chicago Title & Trust Company, a general waiver of the lien prayed for in said bill and waived by said decree; that said waiver was addressed 'To all whom it may concern'; that a photostatic copy of said waiver of lien is hereto

attached, marked Exhibit A and hereby made a part hereof.

"And your petitioners state that they did not know of said waiver of lien and could not by reasonable diligence have known of it, so as to make use thereof in the said cause, previous to and at the time of the pronouncing of said decree. That your petitioners had never heard of the plaintiff herein at any time until one year after the work was completed, when plaintiff demanded payment of them; that several months thereafter, plaintiff sued petitioners and after hearing, took a nonsuit. That thereafter, on January 3, 1938, plaintiff filed his claim for lien in the office of the Clerk of the Circuit Court of Cook County, but that no notice thereof came to petitioners until, to-wit, the 25th day of January, 1938, by opinion of the Chicago Title & Trust Company. That thereupon defendants served a thirty day demand pursuant to statute, on plaintiff to file his bill herein; that prior to said Chicago Title & Trust Company opinion, petitioners had never had any notice of any claim for lien by plaintiff.

"That petitioners were informed on, to-wit, March 1st, 1940, by their attorney, that he had discovered that a waiver of said lien had been executed and delivered by plaintiff to the Chicago Title & Trust Company. And your petitioners are advised that the said new matter is conclusive in nature and effect upon the rights of the plaintiff herein."

Exhibit "A" referred to in the petition is as follows:

"July 29, 1936.

"TO ALL WHOM IT MAY CONCERN:

"Whereas, we the undersigned, Purnell Stucco Recoating Co., have been employed by Thomas Jones to furnish labor and material for stucco work for the building known as 918 Belleforte Ave., Oak Park, Ill.

"NOW, THEREFORE, KNOW YE, That We the undersigned for and in consideration of One Hundred and Seventy-five and no/100 Dollars, and other good and valuable considerations, the receipt whereof is hereby acknowledged, do hereby waive and release any and all lien, or claim or right to lien on said above described building and premises under the Statutes of the State of Illinois relating to Mechanics' Liens, on account of labor or materials, or both, furnished or which may be furnished by the undersigned to or on account of the said _____ for said building or premises.

"Given under hand and seal this 29th day of July
A. D. 1936.

"PURNELL STUCCO RECOATING CO. (Seal)
"H. D. Purnell (owner)

"Exhibit 'A'."

The trial court peremptorily denied defendants' petition for leave to file the bill of review. We think that the court erred in so doing. Since the defendants were not guilty of laches under the facts alleged in their petition, they should have been allowed to file their bill of review. The waiver of lien, which was set forth in and made a part of the petition and the bill of

attached, marked Exhibit A and hereby make a part hereof.

"And your petitioners state that they did not know of said relief of lien and could not by reasonable diligence have known of it, so as to make out as the said relief, petitioners and never heard of the plaintiff herein as not the until one year after they were notified, your petitioners demanded payment of them, that several months thereafter, said relief and petitioners and their husband, took a journey, thereafter, on January 2, 1930, said relief filed his claim for lien in the office of the clerk of the circuit court of Cook County, but that no notice thereof came to petitioners until, to-wit, the 25th day of January, 1930, by opinion of the Chicago Title & Trust Company. That thereupon defendants served a thirty day demand pursuant to statute, to plaintiff to file his bill herein; that prior to said Chicago Title & Trust Company's action, petitioners had never had any notice of any claim for lien by plaintiff.

"That petitioners were informed on, to-wit, March 1st, 1930, by their attorney, that he had discovered that a waiver of said lien had been executed and delivered by plaintiff to the Chicago Title & Trust Company. And your petitioners are advised that the said new matter is conclusive in nature and vitates upon the rights of the plaintiff herein."

Exhibit "A" referred to in the petition is as follows:

"July 23, 1930.

"TO ALL WHOM IT MAY CONCERN:

"Whereas, we the undersigned, FURNELL STUDIO NEGATING CO., have been employed by Thomas Jones to furnish labor and material for certain work for the building known as 918 Baltimore Ave., Oak Park, Ill.

"Now, THEREFORE, KNOW YE, that we the undersigned for and in consideration of the sum of one hundred and no/100 Dollars, and other good and valuable considerations, the receipt of which is hereby acknowledged, do hereby waive and release any and all lien, or claim or right to lien on said above described building and premises under the Statute of the State of Illinois relating to mechanic's liens, on account of labor or materials, furnished or which may be furnished by the undersigned or by or on account of the said _____ for said building or premises.

"Witness under hand and seal this 23rd day of July, A. D. 1930.

"FURNELL STUDIO NEGATING CO. (Seal)
"H. D. FURNELL (owner)

"Remitted '11'."

The trial court peremptorily denied defendants' petition for leave to file the bill of review. We think that the court erred in so doing. Since the defendants were not guilty of laches under the facts alleged in their petition, they should have been allowed to file their bill of review. The waiver of lien, which was set forth in and made a part of the petition and the bill of

review, was executed under seal and delivered by plaintiff to the Chicago Title & Trust Company on July 29, 1936. This new evidence was conclusive and constituted a complete defense to plaintiff's claim. The waiver was general and ran "To all whom it may concern." It contained no conditions or limitations. It expressly described the lien involved here and expressly waived it. It named the parties and specifically described the premises in question. It was under seal and acknowledged payment in full of the specific sum claimed in this case. This waiver furnished an absolute defense to any claim plaintiff might have had against the defendants or anyone else by reason of the performance of the work upon which the instant claim is based. Although the trial court erred in refusing to grant defendants' petition for leave to file their bill of review, it would serve no useful purpose to remand the cause on that account.

For the reasons stated herein the decree of the Circuit court is reversed and plaintiff's complaint is dismissed for want of equity.

DECREE REVERSED. PLAINTIFF'S
COMPLAINT DISMISSED FOR WANT OF
EQUITY.

Friend, P. J., and Scanlan, J., concur.

review, was executed under seal and delivered by plaintiff to the Chicago Title & Trust Company on July 29, 1936. This new evidence was conclusive and constituted a complete defense to plaintiff's claim. The review was general and ran to all whom it may concern. It contained no conditions or limitations. It expressly described the lien involved here and expressly waived it. It named the parties and specifically mentioned the plaintiff in question. It was under seal and acknowledged payment in full of the specific sum claimed in this case. This waiver furnished an absolute defense to any claim plaintiff might have had against the defendants or anyone else by reason of the performance of the work upon which the instant claim is based. Although the trial court found in plaintiff's favor, defendant's petition for leave to file their bill of review, it would serve no useful purpose to remand the cause on that account.

For the reasons stated herein the decree of the Circuit Court is reversed and plaintiff's complaint is dismissed for want of equity.

COMPLAINT DISMISSED FOR WANT OF EQUITY.

Friend, P. L. and General J. J. Conner.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
May Term, A. D. 1940.

307 Ill. App. 3
Ad. 540
Agenda No. 1.

Term No. 1

JAMES MACHAC and MARY MACHAC,)

Appellees)

vs.)

EAST ST. LOUIS & INTERURBAN
WATER COMPANY,)

Appellant.)

Appeal from the

Circuit Court of

St. Clair County.

307 I.A. 540¹

Dady, J.

Plaintiffs recovered a judgment for \$476.00 and costs on a verdict of a jury in a tort action against defendant, from which judgment defendant appeals.

Plaintiffs owned a brick house and lot in East St. Louis, abutting on a public alley. In March 1938, defendant installed a water main in and along this alley, and in so doing dug a trench about twenty-four inches wide and about five feet deep. The inner edge of such trench was about six and a half feet from the nearest wall of such house.

The complaint charged that in digging such trench the defendant carelessly, negligently and improperly used and operated heavy power machinery so close to such house that the operation and vibration of such machinery caused the house to vibrate and the walls and ceilings thereof to be cracked and that the reasonable cost of repairs was \$3,000.

By its answer the defendant acknowledged digging the trench, but denied any negligence, denied causing any injuries and denied that the reasonable cost of the repairs was \$3,000.

The first contention of the defendant is that the plaintiffs did not prove by the greater weight of the evidence that the defendant was negligent, and that the "overwhelming preponderance of the evidence is in favor of the defendant on the question of any damages to this building by the

operation of this machine."

The trench was dug by means of a ditching machine run by a gas engine. One witness for the plaintiff testified that when the machine was working at the place in question it ran into some buried railroad ties and "the ground was shaking just like an earthquake"; another witness who lived across the alley testified that when it struck such ties it "shook the (his) house," that he ran outside and saw the machine stop working and then start again and "it just shook everything around there"; another witness testified that at the time the machine struck such ties he was standing about five feet from the machine and "when it hit the ties it jarred the ground all around"; another that when such machine hit the ties there was "plenty of vibration"; another that "when the scoops would hit the ties the machine shook and shook the ground" and he felt the "shake" when he was about twenty feet from the machine; another that "when the machine pulled the ties out the ground would shake all around." The plaintiffs and a sister of one of the plaintiffs testified that at the time in question they were in the house and felt the house shake and the dishes rattle. Ten employees of the defendant testified that at different times they were in some way connected with the work in question; that there was no vibration at all and no railroad or other ties where the ditch was dug.

Several witnesses testified that before the ditch was dug the walls and ceiling of the house were intact, but were cracked after such digging, the cracks appearing within three or four days.

Defendant contends that it appears from certain photographs "there are no cracks on the wall of that building." We have examined the photographs and do not find them at all helpful in passing from the question of whether or not there were cracks in or on the walls.

The truth of all this testimony was, of course, a question for the jury and we cannot say that the verdict is manifestly against the weight of the evidence. There was ample evidence to justify the jury in finding the defendant was

negligent, and that the house of plaintiff was injured through such negligence.

The next contention of defendant is that the court erred in the following rulings:

"Q. Would you say that any of these cracks in this house were caused by natural settling after twenty some odd years?

"MR. FARMER: I object. That would be a conclusion of the witness and invades the province of the jury.

"The Court: Objection overruled.

To which ruling of the Court counsel for the defendant then and there excepted.

"Q. Would you say that these cracks were caused by natural settling?

"A. No. I don't think so because the house was there so many years and it was all right.

"Mr. Farmer: I move to exclude that answer as incompetent and improper and being a conclusion and invading the province of the jury.

"The Court: Motion denied."

The brief of plaintiffs does not give the name of the witness being examined, and does not refer to any page of the abstract or record, as should be done.

It will be noted that although the court overruled the objection to the first question, there was no answer, so there was no harm in the ruling.

There was no objection to the second question. If the question was objectionable, objection should have been made before the witness replied. In our opinion the motion to exclude the answer should have been allowed, as the question as to what caused the cracks was an ultimate fact to be passed upon by the jury. However, considering the whole record, we do not consider this sufficient to justify a reversal. (See *Schneider v. Manning*, 121 Ill. 376, 386, which is one of the cases cited by defendant.)

The next and last complaint of defendant is that the court erroneously permitted plaintiffs to prove the damages by showing the cost of repairs, and erred in giving the jury an

instruction that the measure of damages was the reasonable cost of the repairs. Only one witness testified on the subject of damages, and his figure was the same as the amount of the verdict. Defendant contends that the measure of damages is the difference in value, if any, of the property before and after the injury. Defendant cites *Peck v. Chicago Rys. Co.*, 270 Ill. 34 and many similar cases in support of his contention. We do not consider any of these cases in point on the facts. Each of such cases was a condemnation case, or a case relating to some public improvement, and in no one of such cases does it appear that there was any charge of or proof tending to show negligence as in the case at bar. In the *Peck* case it was said "The declaration makes no charge of negligence or complaint as to the manner in which the improvement was made ***. The action of the city was not wrongful or illegal. There is no complaint of want of skill or unreasonable delay in the performance of the work." We believe under the pleadings and facts in the case at bar the measure of damages was the reasonable cost of the repairs necessary to restore the property. (*McDonnell vs. Ry. Co.*, 208 Ill. App. 442.)

The court did not err in the admission of evidence or in giving such instruction.

AFFIRMED.

FILED

OCT 28 1940

David P. Mallitt

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

41228

JOSEPH BLUME, TRUSTEE, BLUME
and CHRISTINE HARTEN,

Appellants,

APPEAL FROM

v.

SUPERIOR COURT,

VICTOR H. MUNSECKE, et al.,

Appellees.

COCK COUNTY

307 I.A. 540²

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiffs, the holders of certificates of beneficial interest in a trust, brought suit against the trustee and trust managers to enjoin the sale of the trust property and for the removal of the trust managers. Defendants' motion to strike the complaint was sustained, the suit dismissed for want of equity and plaintiffs appeal.

The allegations of the complaint, as amended, are that in 1928 a lien of a trust deed, securing an indebtedness of \$375,000, was foreclosed and the property sold under the decree to a bondholders' committee; that afterward there was a plan for reorganization pursuant to which the Normandy Hall Building Liquidation Trust was created and the American National Bank & Trust Company named as liquidating trustee. Certificates of beneficial interest were issued to the former bondholders, plaintiffs being the owners of 1700 units of a total of 373,300 units.

The trust agreement provided that the trustee should act upon the direction of the three trust managers who were made defendants and who had the actual management and control of the property; that they might direct the trustee to dispose of the property provided that not less than 30 days' notice be given to the holders of the beneficial units. The agreement further provided that the property could not be sold if the holders of more than 35% of the units objected to the proposed sale.

It was further alleged that Charles H. Albers, as receiver for the Bain banks, was the owner of more than 35% of the units; that defendant, A. A. Mueller, was an employee of the State Auditor who had

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... ..

E. coli, *S. aureus*, *P. aeruginosa*

1. $\frac{1}{2}$ 2. $\frac{1}{2}$ 3. $\frac{1}{2}$ 4. $\frac{1}{2}$ 5. $\frac{1}{2}$ 6. $\frac{1}{2}$ 7. $\frac{1}{2}$ 8. $\frac{1}{2}$ 9. $\frac{1}{2}$ 10. $\frac{1}{2}$

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FROM THE UNIVERSITY OF CHICAGO PRESS, CHICAGO, ILLINOIS, U.S.A.

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the same extent as the two following passages that will

upon the direction of the Trust management who were sole directors and who had the actual management and control of the property; that they might direct the trustees to dispose of the property provided that not less than 30 days' notice be given to the holders of the beneficial units. The agreement further provided that the property could not be sold if the holders of more than 50% of the units so directed to the proposed sale.

It was further stated that Charles H. Alpert, an employee

For the last part, see the notes at the end of the book.

supervision of the liquidation of the Bain banks which were then in process of liquidation; that about June 20, 1939, Margaret Morrissey offered \$100,000 for the property, and upon information and belief it was alleged that she was acting as nominee "on behalf of certain persons whose names are unknown to the plaintiff." That the trust managers agreed to do everything in their power to consummate the sale "at a price of \$100,000 even though they had previous to that time received other offers for the property ranging from \$110,000 to \$120,000," which offers had never been submitted to the owners of the units although "the Trust Managers full well knew that if the property were offered freely for sale among brokers and persons interested in property of such type, offers of more than \$100,000 therefor could have been readily procured." That the trust managers, about the time they received the offer from Margaret Morrissey, directed the trustee to notify the holders of the units of the proposed sale; that Mueller recommended to Albers, the receiver, that the proposed sale be accepted and that Albers should not file any objection to it; that plaintiffs, as owners of units, were notified of the proposed sale and being dissatisfied "sought out other purchasers" and procured an offer from Lucille B. Wolff to purchase the property for \$108,000 cash, which offer was submitted to the trustees; that thereupon Mueller filed with the trustee, objection to the proposed sale to Margaret Morrissey, signed by Albers, the receiver, as owner of more than 50% of the outstanding units and as a result the sale to Margaret Morrissey was abandoned and notice of the proposed sale to Lucille B. Wolff for \$108,000 was sent by the trustee, at the direction of the trust managers, to the holders of the units, but that such submission was "a mere sham in that the Trust Managers already knew that A. A. Mueller had induced Charles M. Albers to dissent from said last mentioned sale and in that said A. A. Mueller did induce Charles M. Albers as Receiver to file a written dissent from the proposed sale at \$108,000 even though they had been willing and it was their in-

negotiation of the liquidation of the said bank which was then in
 process of liquidation. That check was \$1,100,000.00 and was
 offered \$100,000.00 for the property, and was indorsed and dated at
 was alleged that she was acting as agent for the bank. That the bank
 persons whose names are known to the plaintiff. That the bank
 monies were to be distributed in their favor as mentioned in the said
 that a copy of the same was made and given to the bank
 received other offers for the property ranging from \$10,000.00 to
 \$100,000.00, which offers had never been submitted to the board of the
 bank although the bank manager told him that all the property
 was offered freely for sale among bankers and persons interested in
 property of such type, offered at more than \$100,000.00. That he
 have been readily purchased. That the bank manager, about the time
 they received the offer from Margaret Harkness, advised the trustee
 to notify the holders of the units of the proposed sale; that he
 intended to do so. That, however, that the proposed sale was not
 carried out and that Alice should not file any objection to it; that
 plaintiff, as owner of units, was notified of the proposed sale
 and being dissatisfied, sought out other purchasers, and purchased on
 other than units. A writ of prohibition was granted for \$100,000.00,
 which offer was submitted to the trustees; that Margaret Harkness
 filed with the trustees, objection to the proposed sale in Margaret
 Harkness, signed by Alice. The trustees, at a meeting of more than 100
 of the outstanding units and as a result the sale was postponed.
 Harkness was abandoned and notice of the proposed sale to plaintiff A.
 writ for \$100,000.00 was sent by the trustees, at the direction of the
 trust monies, to the holders of the units, but that such distribution
 was not made in time the trust monies already were that A. A.
 plaintiff had obtained from the trustees a check for \$100,000.00
 plaintiff was and in that case A. A. Harkness did induce Charles H.
 plaintiff to file a written demand from the proposed sale
 at \$100,000.00 was made. They had been willing and it was about 10-

vention to sell the property at a lesser price to "Margaret Morrissey," and that the sale to Lucille H. Wolff was thereupon abandoned.

That shortly thereafter, the trust managers submitted to the trustee another offer by "Margaret Morrissey" to purchase the property for \$108,000 and directed the trustee to enter into an agreement to sell pursuant to the offer and caused the trustee to notify the holders of units of the proposed sale "that such new offer was submitted and such agreement was made in spite of the fact that no further effort had been made by the Trustees to secure competitive bidding from Lucille H. Wolff or from any other person;" that "the Trust Managers are still acting pursuant to a secret agreement with the persons for whom Margaret Morrissey is acting as nominee, to deliver the property to such persons at the cheapest price possible" and that Mueller induced Albers, receiver, not to file any objection to the proposed sale for \$108,000. "That the plaintiffs could procure offers for said premises at a price in excess of \$108,000 cash, but that it would be idle for them to procure and submit any further offer because the Trust Managers have secretly agreed with the principals of Margaret Morrissey not to sell the property at all unless it is sold to such principals; and that as a matter of fact the fair cash market value of the property is not less than \$135,000."

The allegations of the amended complaint charge defendants with fraud in the proposed sale of the property. In Haskell v. Art Institute of Chicago, 304 Ill. App. 393, in passing on the sufficiency of allegations where the charge made was similar to the charge in the instant case, we said: "In 10 E. C. L. p. 415, in discussing the sufficiency of the allegations of fraud it is said: 'An exceptionally high degree of certainty in the allegations of the bill is required in those cases where the cause of action is based on fraud'; that general averments of fraud are wholly inadequate. 'In making allegations of fraud, good pleading requires that the plaintiff should state specifically the inculpatory facts in order that they may carry their own

conviction of fraud and in order that the wrong-doing may thereby be made more clearly to appear.' In Dickinson v. Dickinson, 308 Ill. 521, the court said: 'a general allegation of fraud, however strong in expression, is insufficient. The bill should point out and state the particular facts and circumstances relied on as constituting the fraud.' No general rule can be laid down as to when it is sufficient to plead an ultimate fact and what allegations are sufficiently specific, but the facts in each case must be considered.'

In the instant case we think the allegations are clearly insufficient. It is alleged that when Margaret Morrissey offered to purchase the property for \$100,000 and the beneficial owners were notified that an offer of \$105,000 had been made by Lucille R. Wolff, Albers, the receiver, who owned more than 35% of the units filed objections to the proposed sale and it was abandoned, and the beneficial owners were then notified of the Wolff offer. Objections were filed to this sale and it was abandoned because Margaret Morrissey had offered \$105,000 and the beneficial owners of the units were notified of this fact, all clearly showing that the trustee and the managers were trying to get the best offer they could for the property. The allegations of the complaint, that offers had been made for the property from other persons, ranging from \$110,000 to \$120,000, are entirely too general and insufficient.

Moreover, it is clear that if plaintiffs had called to the attention of the court that anyone would offer more than \$105,000 for the property, the sale would not be consummated. But there is no allegation that plaintiffs did anything in this respect.

The decree of the Superior court of Cook county is affirmed.

DECREE AFFIRMED.

Hatchett, J., and McSurely, J., concur.

conviction of fraud and in order that the same should not be
made more closely to appear. In Washington v. United States, 101 U.S. 163,
the court said: 'In general allegations of fraud, however stated in an
affirmative, are inadmissible. The bill should state the facts and
particular facts and circumstances relied on as constituting the
fraud.' No general rule can be laid down as to when it is sufficient
to place an affirmative fact and what allegations are inadmissible.
Specifically, but the facts in each case must be considered.
In the instant case we think the allegations are clearly in-
admissible. It is alleged that said defendant conspired with
certain persons for the purpose of defrauding the United States and
that on or about the 1st of May, 1900, said defendant conspired with
certain persons, who owned more than 100 of the said land of-
ficers to the property said and it was abandoned, and the defendant
owned more than 100 of the said officers. Defendant have filed
in this case and it was abandoned because defendant have not filed
more than 100,000 and the defendant owner of the said were notified of
this fact, all clearly showing that the defendant and the managers were
trying to get the best offer they could for the property. The al-
legations of the defendant, that either was made for the purpose
from other persons, passing from 1900 to 1900, and originally
two general and inadmissible.
Moreover, it is clear that if defendant had called to the
attention of the court that anyone would offer more than 100,000 for
the property, the case would not be connected. But there is no al-
legation that defendant did anything in this respect.
The degree of the defendant's case of such conduct is entirely
inadmissible.

Witness: J. J. and Mary, J. J. witness.

41257

ROMAN KOPPERT,

v.

CITY OF CHICAGO, a Municipal
Corporation,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

307 I.A. 541

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action to recover damages for personal injuries claimed to have been sustained while he was driving his automobile west on East 95th street, in Chicago. The automobile ran into a hole in the street, as a result of which plaintiff was injured. There was a jury trial, a verdict and judgment in plaintiff's favor for \$7500 and defendant, City of Chicago, appeals.

The only point made by defendant in this court is that 95th street, at the place in question "was part of the system of State highways, and was maintained by the State of Illinois; that the city owed no duty to maintain" the street and therefore was not liable. The law is clear that where a street in a city is taken over as a part of the highway system of the state, the city is not liable for failure to keep the street in repair. Tanscott v. City of Chicago, 301 Ill. App. 322; Live Stock National Bank v. Richardson, 303 Ill. App. 416. In the instant case there is no contention to the contrary but plaintiff contends there is no evidence in the record that 95th street, at the time and place of the accident, was a Federal Aid Route and taken over by the state. The evidence shows that 95th street was a well traveled, busy street in Chicago, with street lights, signs, water mains, street cars and the customary red and green stop lights near the place of the accident. "This was prima facie evidence that it was a city street." Tanscott v. City of Chicago, 301 Ill. App. 322.

Defendant, to maintain its contention that the street at the time of the accident, June 1, 1937, had been taken over as a part of the state system of highways, offered in evidence two documents, each

ALERT

LEGAL DOCUMENT

CITY OF CHICAGO, a corporation,
Defendant.

Plaintiff.

307 I.A. 241

CHICAGO, ILL.

IN SENATE

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injuries claimed to have been sustained while he was driving his automobile west on East 28th Street, in Chicago. The automobile ran into a hole in the street, as a result of which plaintiff was injured. There was a jury trial, a verdict and judgment in plaintiff's favor for \$7500 and defendant, City of Chicago, appeals.

The only point made by defendant in this case is that with respect to the place in question was part of the system of State Highways, and was maintained by the State of Illinois; that the city owed no duty to maintain the street and therefore was not liable. The law is clear that where a street is taken over as a part of the Highway System of the State, the city is not liable for failure to keep the street as a highway. Baroness v. City of Chicago, 201 Ill. App. 2d 321.

201 Ill. App. 2d 321; Lave (Lave National Bank v. Lave). The city is not liable in the instant case there is no contention to the contrary but plaintiff contends there is no evidence in the record that this street, at the time and place of the accident, was a Federal Aid Route and hence over by the State. The evidence shows that 28th Street was a well traveled, busy street in Chicago, with street lighting, sidewalks, main, gutter curb and the emergency road and cross street lights near the place of the accident. "This was plain facts evidence that it was a city street." Baroness v. City of Chicago, 201 Ill. App. 2d 321. Defendant, to maintain its contention that the street at the time of the accident, June 1, 1937, had been taken over as a part of the State system of highways, offered in evidence two documents, each

dated December 18, 1930. One is addressed to Mayor Kelly of Chicago, and signed by Ernst Lieberman, "Chief Highway Engineer, Rolling Dept. of Highways," in which it is said that on December 1, 1931, a map was sent to Colonel Sprague, Commissioner of Public Works of Chicago, showing extensions of "State Bond Issue Routes" in the City of Chicago and that "There have been a number of changes and additions to the State Bond Issue and Federal Aid Routes since that time. Decisions are being sent you, with this letter, showing the present locations of all State Bond Issue and Federal Aid Routes in the City of Chicago. These decisions supersede the information contained on the map accompanying the letter of December 1, 1931." The other is a document which purports to be signed by "F. L. Smith, Director" on what purports to be a letter-head of the "Department of Public Works and Buildings - Division of Highways - Springfield, Illinois" and is as follows: "Federal Aid Route No. 120 In the City of Chicago - The Department of Public Works and Buildings announces that the following described location is now the location of Federal Aid Route No. 120 in the City of Chicago. - Description of Route.

"Beginning at the west limits of the City of Chicago on 95th Street and extending in an easterly direction along 95th Street to the intersection with South Chicago Avenue."

Upon objection to the admission of these documents by counsel for plaintiff, the court announced that the objection would be denied "until such time as it may be connected up," - that defendant produce more evidence to show that the street had been taken over by the state. No further evidence having been produced by the city, the documents were excluded.

Counsel for defendant say: "The legislature has placed the exclusive control and jurisdiction over Federal Aid Routes in the State," and refer to pars. 292, 297 and 298, chap. 121, Ill. Rev. Stats. 1929.

Par. 292 provides: "The system of State highways shall now-

[illegible]

prise the following roads: ***

"(4) All highways constructed, or authorized to be constructed, by the State and Federal governments, and known as 'Federal Aid Roads;' ***

"(10) *** Such highways shall be known as 'State Highways.'"

Par. 297 provides: "When roads are to be taken over by state.

"Sec. 7. The highways designated in this Act as State highways shall be taken over from the several *** cities, *** by the Department of Public Works and Buildings, as provided in said Acts, and those parts of said State highways on which no durable hard-surfaced improvements have been started or completed under the provisions of the Acts designated in this Act may be taken over by the Department of Public Works and Buildings in its discretion, as rapidly as the appropriations made for repairs, improvement and maintenance thereof permit, provided the Department shall first take over the State Bond Issue Roads. Before any highway, or part thereof, on which no durable hard-surfaced improvements have been started or completed under the provisions of the Acts designated in this Act, forming a portion of the State highway system, is taken over the Department of Public Works and Buildings shall notify in writing the commissioner of highways of the town or road district, the County Superintendent of Highways, or the mayor of the city, or president of the village, as the case may be, of its intention so to do, and of the date when it will assume the maintenance and care thereof. Whenever any part or portion of any highway which is a part of the State highway system and lies and is situated within the limits of any city, *** is taken over, the Department of Public Works and Buildings shall have exclusive jurisdiction and control over only that part of such highway which the State has constructed, or which the local authority has constructed and which has been taken over by the State, and for the maintenance of which the State is responsible."

...the following results:

(d) All attempts made to establish contact with the ...

...of the ... and ...

100-443887-1000

Sec. 1. The highways designated in this act as State Highways shall be taken over from the several cities, towns and villages of this State and dedicated to public use and enjoyment, as provided in this act, and those parts of said State Highways in which no dedicatory deed or agreement have been entered or completed under the provisions of the laws designated in this act may be taken over by the Department of Public Works and Buildings in the discretion, as herein provided, of the Department made for repair, improvement and maintenance thereof, provided the Department shall first give the land owner notice. Before any Highway is taken over, no other no dedicatory deed or agreement have been entered or completed under the provisions of the laws designated in this act, following a portion of the State Highway system, is taken over the Department of Public Works and Buildings shall notify in writing the Commissioner of the Town or Road District, the County Representative of Highways, or the Mayor of the City, or President of the Village, as the case may be, of its intention as to do, and of the date when it will assume the management and care thereof. However any part or portion of any Highway which is a part of the State Highway system and lies and is situated within the limits of any city, town or village, the Department of Public Works and Buildings shall have exclusive jurisdiction and control over only that part of such Highway which the State has constructed or which the local authority has constructed and which has been taken over by the State, and for the maintenance of which the State is responsible.

And par. 293 provides: "When a part or portion of the highway shall have been taken over it shall thereafter be constructed, re-constructed, repaired, improved and maintained by the State in accordance with the provisions of this Act."

We think the two documents offered by defendant as evidence that 95th street had been taken over by the state were entirely insufficient to show a compliance with the statute. And this too, even if we assume the documents were original and not carbon copies, as counsel for plaintiff contends, there is nothing in either of them which shows the state intended to take over 95th street, nor is any time mentioned when the state "will assume the maintenance and care" of the street as required by par. 297. Live Stock Wat. Bank v. Richardson, 303 Ill. App. 445.

The judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

Witchett, J., and McSurely, J., concur.

-4-

and any. The provisions "shall have been taken over if their character be considered, re-constructed, repeated, improved and retained by the same in accordance with the provisions of this act."

We think the two documents referred to defendant as evidence that 1882 report had been taken over by the same with essential in-entirety to show a compliance with the statute. And this too, even if we assume the documents were original and not carbon copies, is correct for identical contents, there is nothing in either of them which shows the state intended to take over 1882 report, nor is any time mentioned when this state would assume the administration and control of the report as required by law. 1882, Act March 22, 1882, Section 100, Vol. III, App. 445.

The judgment of the Circuit Court of Cook County is affirmed. FORWARDED 11th SEPTEMBER 1882.

41281

FULTON E. BURKE,

Appellee,

v.

MARGARET LEE BURKE,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

307 I.A. 541²

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

November 22, 1938, plaintiff filed his verified complaint against his wife, the defendant, praying that a writ of injunction issue against defendant enjoining her from taking the four year old son of the parties "out of the State of Illinois and out of the jurisdiction of the Courts of Cook County, Illinois" without first obtaining permission of the court so to do. On the same day the court entered an ex parte order as prayed for, a summons issued and was served on defendant. December 12 following, defendant by her counsel entered her appearance and on December 13, filed her verified answer to the complaint.

The material allegations of the complaint, so far as it is necessary to state them here, are that the parties were husband and wife living in Cook county, Illinois, and had been living there nearly all their lives; that a son was born to them who was four years old March 19, 1938; that plaintiff had conducted himself properly toward his wife but that she indicated she wished a divorce from him; that for the past sixty days defendant had been in California with her relatives and when plaintiff refused to send the child to defendant in California, she returned to Illinois for the sole purpose of taking the child out of the jurisdiction of Illinois and threatened to establish her residence in California or Nevada where she would get a divorce without legal residence, her residence being in Illinois, and on grounds not recognized in Illinois; that if she took the child to California or Nevada as she threatened to do, she would there seek the custody of the child from courts of those states; that if plain-

11/11/38

FILED IN CASE NO. 1000

RECEIVED THE COURT

CLERK

807 L.A. 541

November 10, 1938, Plaintiff filed his verified complaint against his wife, the defendant, praying that a writ of injunction issue against defendant enjoining her from taking the four year old son of the parties out of the State of Illinois and out of the jurisdiction of the Courts of Cook County, Illinois, without first obtaining permission of the court to do so. On the same day the court entered an ex parte order as requested, a summons issued and was served on defendant. Defendant is following, defendant by her counsel entered her appearance and on November 10, filed her verified answer to the complaint.

The material allegations of the complaint, so far as it is necessary to state them here, are that the parties were husband and wife living in Cook County, Illinois, and had been living there nearly all their lives; that a son was born to them who was four years old March 19, 1936; that Plaintiff had conducted himself properly toward his wife but that she indicated she wished a divorce from him; that for the past ninety days defendant had been in California with her relatives and when Plaintiff returned to send the child to defendant in California, she returned to Illinois for the sole purpose of taking the child out of the jurisdiction of Illinois and threatened to establish her residence in California or Nevada where she would get a divorce without legal residence, her residence being in Illinois, and on grounds not recognized in Illinois; that if she took the child to California or Nevada as she threatened to do, she would there seek the custody of the child from courts of those states; that if Plaintiff

tiff brought suit in California or Nevada he, on account of financial circumstances, would be unable to go there to protect his rights; that he had no adequate remedy except in a court of equity; that plaintiff had offered to permit defendant to take the child to California for a visit if she would agree to return him to Cook county, which she refused to do.

Defendant in her answer admitted she was and had been a resident of Illinois; denied plaintiff had conducted himself properly toward her but on the contrary he "by his conduct created an incompatible relationship" which resulted in their separation. She admits she had been visiting in California for about sixty days and had returned to Illinois for the purpose of taking the child to California because plaintiff had failed to send the child to her as he had promised; that the child had been ill and she wanted to have him under her care in the climate of California which would be beneficial to him. She denied she had threatened to establish her residence outside of Illinois and obtain a divorce from plaintiff; that the parties on numerous occasions had agreed that in case of a permanent separation they would divide the custody of the child between them, and that she would be staying in California with her mother at the latter's home.

Nothing further appears to have been done in the case for nearly a year until November 9, 1938, when an order was entered by agreement of both parties that the injunction order be modified so that plaintiff should have custody of the child until December 15, 1938, with the privilege of defendant seeing and visiting the child at reasonable times, and that December 15, 1938, the custody of the child would be given to defendant and she might take the child to California and return him to River Forest, Illinois, where the parties lived May 1, 1939, and that plaintiff should have the custody of the child from that time until September 1, 1939; that plaintiff should pay defendant \$45 per month for the support of the child semi-monthly while the child was in California.

...in California or Nevada, on account of financial
circumstances, would be unable to come to protect his rights; that
he had no adequate remedy except in a court of equity; that Plaintiff
had offered to permit Defendant to take the child to California for a
visit if she would agree to return him to West County, which she re-
fused to do.

Defendant in her answer admitted she was not and does not
reside in Illinois; denied Plaintiff had contacted Plaintiff properly
toward her but on the contrary he "by his conduct created an incompati-
ble relationship" which resulted in their separation. She admits she
had been visiting in California for about sixty days and had returned
to Illinois for the purpose of taking the child to California because
Plaintiff had failed to send the child to her as he had promised; that
the child had been ill and she wanted to have him under her care in the
climate of California which would be beneficial to him. She denied she
had attempted to establish her residence outside of Illinois and ob-
tain a divorce from Plaintiff; that she parted on numerous occasions
and agreed that in case of a permanent separation they would divide
the custody of the child between them, and that she would be staying
in California with her mother at the latter's home.

During Plaintiff's absence from the child, an order was entered by
the court on November 2, 1935, when an order was entered by
agreement of both parties that the injunction order be modified so that
Plaintiff should have custody of the child until December 15, 1935,
with the privilege of Defendant seeing and visiting the child at reason-
able times, and that December 15, 1935, the custody of the child would
be given to Defendant and she might take the child to California and
return him to River Forest, Illinois, where the parties lived May 1,
1935, and that Plaintiff should have the custody of the child from
that time until September 1, 1935; that Plaintiff should pay Defendant
\$40 per month for the support of the child semi-monthly while the
child was in California.

December 22, 1939, plaintiff, upon notice to defendant's counsel, filed his verified petition in which he set up the issuance of the injunction ^{and} the modification of the order, as above stated; that the child had been taken to Los Angeles by defendant pursuant to the modified order; that defendant had refused to permit the child to be returned to plaintiff in accordance with the agreement between the parties, and the prayer was that a rule be entered requiring her to show cause why she should not be punished for contempt of court for failing to comply with the modified order.

On the same day an order was entered which recites the filing of the verified petition by plaintiff, and it was ordered that defendant show cause by January 2, 1940, why she should not be punished for contempt of court for failure to comply with the modified order. December 28, 1939, defendant's counsel filed a verified petition in which he set up that on December 22, when the order requiring defendant to show cause was entered, he was out of the city and sought to have the matter continued through the efforts of another attorney; that defendant was not residing in Los Angeles with her mother; that defendant had a good defense to the petition and wished to answer it, and the prayer was that the court enter an order extending the time for defendant to show cause to January 30, 1940. December 28, an order was entered substituting counsel for defendant. January 8, 1940, an order was entered which recites the rule entered against defendant came on to be heard; that a certified copy of the rule had been served on defendant; that defendant was not present in person but had filed her answer which the court held insufficient, and it was ordered that a writ of attachment for contempt issue forthwith against defendant for her refusal to comply with the order "touching the custody" of the child. The next day defendant filed her verified petition to modify the order entered December 18, 1939; that since the entry of the injunctive order plaintiff had instituted a suit for divorce in the Superior court of Cook county in which he prayed

January 22, 1940, Plaintiff, who came to defendant's counsel, filed his verified petition in which he set up the issuance of the injunction ^{and} the modification of the order, as above stated; that the child had been taken to his mother by defendant pursuant to the verified order; that defendant had refused to permit the child to be returned to plaintiff in accordance with the agreement between the parties, and the prayer was that a rule be entered requiring her to show cause why she should not be punished for contempt of court for failing to comply with the modified order.

On the same day an order was entered which recites the filing of the verified petition of plaintiff, and it was ordered that defendant and show cause by January 2, 1940, why she should not be punished for contempt of court for failing to comply with the modified order. December 18, 1939, defendant's counsel filed a verified petition in which he set up that on December 12, when the order requiring defendant and to show cause was entered, he was out of the city and sought to have the matter continued through the efforts of another attorney; that defendant was not residing in Los Angeles with her mother; that defendant had a good reason for her failure and asked to answer by and the prayer was that the court enter an order extending the time for defendant to show cause to January 20, 1940. December 18, an order was entered extending the time for defendant to answer by January 4, 1940, an order was entered which recites the rule entered against defendant came on to be heard; that a certified copy of the rule had been served on defendant; that defendant was not present in person but had filed her answer which the court held insufficient, and it was ordered that a writ of attachment for contempt issue forthwith against defendant for her failure to comply with the order "showing the cause" of the child. The next day defendant filed her verified petition to modify the order entered December 18, 1939, and also the entry of the informational order of plaintiff and introduced a bill for divorce in the superior court of Cook county in which he prayed

for the custody of the child; that shortly after the filing of plaintiff's suit for divorce in Cook county, she filed a suit for divorce in California against him; that she was willing to agree that the custody of the child might be divided between them and prayed that the original injunctive order be modified so as to promote the best interest of the child.

January 9, 1940, defendant filed her verified answer to the petition for contempt in which she set up in considerable detail the difficulties which arose between the parties and the correspondence between her counsel in California and plaintiff's counsel in Chicago. This answer is sworn to by defendant December 29, 1939, and apparently is the answer which the court found insufficient as shown by the order entered January 8, 1940. It is from the order of January 8, 1940, that defendant appeals.

Defendant contends that "A court of equity has ^{no} jurisdiction to adjudicate between husband and wife as to the custody of their minor child, while the parties maintain their marital status;" that in the instant case the court was wholly without jurisdiction, and reliance is placed on Thomas v. Thomas, 250 Ill. 354. In that case it was held that equity had no jurisdiction to decree the custody and control of the children of the parties except as an incident to a divorce suit. The court there held that neither a want of harmony between husband and wife relating to the management of their children, nor the right of either to their custody, control, support or education involved any equitable question of an equitable nature such as authorizes a court of equity to decree the care and custody of children, as between their parents, except as provided by the divorce suit in case a divorce were granted.

Counsel for plaintiff contends the rule announced in the Thomas case is not controlling because in the instant case he is not seeking the custody of the son but only that the domicile of the child

for the custody of the child; that shortly after the filing of said
1977's suit for divorce in said county, she filed a suit for divorce
in California against him; that she was willing to agree that the
custody of the child might be divided between them and agreed that the
original injunctive order be modified so as to promote the best
interest of the child.

January 8, 1980, Defendant filed her verified answer to the
petition for contempt in which she set up the considerable detail the
difficulties which arose between the parties and the correspondence
between her counsel in California and Plaintiff's counsel in Chicago.
This answer is sworn to by defendant December 20, 1980, and apparently
is the answer which the court found inadmissible as shown by the
order entered January 8, 1980. It is from the order of January 8, 1980,
that defendant appeals.

Defendant contends that in suit of said Plaintiff
to adjudge between husband and wife as to the custody of their
minor child, while the parties maintain their marital status; that
in the instant case the court was wholly without jurisdiction, and
reliance is placed on Thorne v. Thorne, 200 Ill. 324. In that case
it was held that equity had no jurisdiction to decide the custody and
control of the children of the parties except as an incident to a
divorce suit. The court says that said Plaintiff's suit is merely
between husband and wife relating to the management of their children,
not the right of either to their custody, control, support or
education involved any equitable question of an equitable nature such
as authorized a court of equity to decide the care and custody of
children, as between their parents, except as provided by the divorce
suit in case a divorce was granted.

Plaintiff for Plaintiff contends the wife announced in the
Thorne case is not controlling because in the instant case she is not
seeking the custody of the son but only that the husband Thorne v. Thorne

-2-

remain in Illinois. We are unable to agree with this contention. Several of the orders specifically provided for the custody of the child and we think the cause cannot be distinguished from the Thomas case.

We hold the court had no jurisdiction of the subject matter of the suit and the order appealed from is reversed.

ORDER REVERSED.

Witchett, J., and McSurely, J., concur.

41292

JAMES A. MAGUIRE,

v.

LUX CLEANERS, INC.

—
LUX CLEANERS, INC.

Appellee,

v.

JOSEPH NOTTLE, doing business
as "NOTTLE CLEANERS,"

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

307 I.A. 542

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

November 16, 1936, James A. Maguire brought an action against the Lux Cleaners, Inc., a corporation, to recover \$3500 for damages on account of the claimed negligence of defendant in cleaning plaintiff's rugs which Maguire delivered to defendant September 30, 1935. It was alleged that on the date of the delivery of the rugs the reasonable value of them was \$3600, and when they were returned the reasonable value was \$1100. December 31, defendant filed its answer admitting it received the rugs September 30, 1935, for the purpose of cleaning them, denied other matters and that plaintiff was entitled to no damages. Some orders were afterward entered and February 4, 1937, defendant filed its petition praying that the order of the court theretofore entered, setting the cause for trial, be vacated and that Joseph Nottle be made a party defendant. On the same day an order was entered vacating the order which set the cause for trial and leave was given defendant to file its amended answer within 20 days. Another order was entered on the same day that Joseph Nottle "be impleaded as a party defendant" and that summons issue as provided by §26 of the Civil Practice act.

February 23, the Lux Cleaners, Inc. amended its answer by alleging that Joseph Nottle, as a matter of fact, performed the services in cleaning plaintiff's rugs, and if they were damaged it

JOHN A. WOODRUFF,

v.

THE CLEAREN, INC.

THE CLEAREN, INC.

JOHN A. WOODRUFF, 100 WEST 11TH STREET, NEW YORK, N. Y. 10011.

3071A.242

THE FOLLOWING OFFICE OF THE COURT OF THE CITY OF NEW YORK.

November 13, 1935, James A. Woodruff brought an action

against the Law Clearing, Inc., a corporation, to recover \$1000 for damages on account of the alleged negligence of defendant in cleaning plaintiff's rug which was delivered to defendant September 30, 1935. It was alleged that on the date of the delivery of the rug the reasonable value of then was \$1000, and when they were returned the reasonable value was \$1100. Defendant filed its answer admitting it received the rug September 30, 1935, for the purpose of cleaning them, denied other matters and that plaintiff was entitled to no damages. Some orders were afterward entered and

February 4, 1937, defendant filed its motion praying that the order of the court theretofore entered, setting the cause for trial, be vacated and that Joseph Wolfe be made a party defendant. On the same day an order was entered vacating the order which set the cause for trial and leave was given defendant to file its amended answer within 30 days. Another order was entered on the same day that Joseph Wolfe be replaced as a party defendant and that unknown name as previously filed by the Civil Practice Act.

February 23, the Law Clearing, Inc., amended its answer by

alleging that Joseph Wolfe, as a witness of fact, perjured himself in testimony in clearing plaintiff's rug, and at that time was liable to

was his fault. The next that appears in the record is a pluries summons dated June 17, 1937, which was served on Wettle July 9, 1937.

Nothing further appears until the following March 3, 1938, when an order was entered dismissing the suit for want of prosecution and although the suit was dismissed, no one seemed to have learned of this fact, and September 20, 1938, the Lux Cleaners, Inc. filed its claim against Wettle, in which it alleged it had received the rugs from Maguire and turned them over to Wettle who did the actual work cleaning the rugs, and if Lux was held liable to Maguire, Wettle should be required to pay Lux.

The next that appears in the record was that December 2, 1938, a stipulation between Maguire and Lux Cleaners to set aside the order of March 3, 1938, dismissing the suit for want of prosecution, was filed. On the same day an order was entered which recites the cause came on to be heard upon the stipulation between Maguire and Lux Cleaners, Inc., and it appearing that Joseph Wettle had been impleaded as an additional defendant and had been served by process, that he was in default for failure to file an appearance, that the cause was dismissed through misprison of the clerk, and the action was reinstated. Obviously Wettle was not in default. When he was served there was no pleading in the case claiming anything from him, and when the claim against him was afterward filed he was not notified and no rule was entered on him to answer the claim.

After the order of December 2, reinstating the cause was entered, the next that appears is that February 3, 1939, counsel for the Lux Cleaners served notice on counsel for Maguire, supported by an affidavit, that he would ask the cause to be put on the trial calendar. April 24, counsel for plaintiff served notice on counsel for the Lux Cleaners that he would move the court to set the case for early hearing. The notice recited that a default had been taken against Wettle because he had failed to appear and answer, and April 24 an order was entered in accordance with the notice, which recites

was his trial. The next that appears in the record is a citation
summons dated June 17, 1937, which was served on Joseph July 9, 1937.
Nothing further appears until the following March 2, 1938.

When an order was entered dissolving the writ for want of prosecution
and although the writ was dissolved, no one seemed to have learned of
this fact, and September 20, 1938, the law clerk, Geo. W. Allen, the
clerk against notice, in which it alleged it had received the writ
from Joseph and turned them over to Joseph and his law firm, work
concerning the writ, and it was held liable to Joseph, Joseph
should be required to pay law.

The next that appears in the record was that November 7,
1938, a stipulation between Joseph and his lawyers to set aside the
order of March 2, 1938, dissolving the writ for want of prosecution.
The stipulation was filed. On the same day an order was entered which required the
cause come on to be heard upon the stipulation between Joseph and
law clerk, Geo. W. Allen, and it appearing that Joseph's writ had been in-
cluded as an additional defendant and had been served by process, that
he was in default for failure to file an appearance, that the cause
was dissolved through stipulation of the clerk, and the action was rein-
stituted. Obviously notice was not in default. When he was served
there was no pleading in the case claiming anything from him, and
when the claim against him was afterwards filed he was not notified
and no rule was entered on him to answer the claim.

After the order of November 7, reinstating the cause was
entered, the next that appears in the record is that February 3, 1939, counsel for
the law clerk served notice on counsel for Joseph, supported by an
affidavit that he would ask the cause to be put on the trial
calendar. April 24, counsel for Plaintiff served notice on counsel
for the law clerk that he would move the court to set aside the
entry bearing. The motion stating that a default had been taken
against Joseph because he had failed to appear and answer and that
he was not entered in accordance with the notice, which was

that on motion of counsel for Maguire it appeared that Wottle had been served with summons, had failed to file his answer, and it was ordered that he be defaulted. This was obviously erroneous because Wottle had not been notified, and no rule had been entered upon him to answer.

May 18, 1939, an order was entered which recites the coming on of the cause to be heard on the complaint of Maguire, the answer to the claim of the Lux Cleaners, and the default of Wottle and "IT IS ORDERED that a finding of this court be and it is hereby entered against defendant and counter-claimant, LUX CLEANERS, Incorporated, and against JOSEPH WOTTLE, counter-defendant, and damages assessed against said LUX CLEANERS and JOSEPH WOTTLE," for \$2500, and judgment was entered against both. It is hardly necessary to state this was wholly erroneous as against Wottle for the reasons stated.

June 16, Wottle, by his counsel, moved the court for leave to file a special appearance and to vacate the orders of December 2, 1938 and May 18, 1939, and it was ordered that Wottle be given leave to file a special appearance, and the hearing of his motion was set for July 13. On the same day, June 16, Wottle filed his special appearance and his motion supported by affidavit. June 23, the court entered an order, on motion of Wottle, which finds it had jurisdiction of the parties, and it was ordered that the motion to set aside the order of December 2, 1938, reinstating the cause be denied. The order of default and judgment against Wottle was vacated and he was given leave to plead within 20 days.

July 19, Wottle filed a document entitled "Plea of Defendant, Joseph Wottle" divided into two parts, "Motion" and "Answer." The motion was again to vacate the order reinstating the cause and the judgment. The answer part of this document avers that Wottle had no knowledge of the allegations of the complaint, demands strict proof and denied liability. July 27, following, on motion of plaintiff Maguire, it was ordered that the plea of Wottle be stricken. It was further ordered that the motion of plaintiff to strike Wottle's answer be denied.

that on motion of counsel for appellee it appeared that appellee had been served with summons, and failed to file his answer, and it was ordered that he be defaulted. This was obviously erroneous because appellee had not been notified, and no rule had been entered upon him to answer.

May 18, 1933, an order was entered which vacated the setting on of the cause to be heard on the complaint of appellee, the answer to the claim of the law firm, and the default of appellee and it is ORDERED that a finding of this court be and it is hereby entered against appellee and against appellant, the firm, its members, and against JOSEPH WATKINS, counsel-at-law, and damages assessed against said LAW FIRM and JOSEPH WATKINS, "for \$1000, and judgment was entered against both. It is hereby necessary to state this was wholly erroneous as against appellee for the reasons stated.

June 18, 1933, by his counsel, moved the court for leave to file a special appearance and to vacate the order of December 2, 1932 and May 18, 1933, and it was ordered that appellee be given leave to file a special appearance, and the hearing of his motion was set for July 15. On the same day, June 18, appellee filed his special appearance and his motion supported by affidavit. June 22, the court entered an order, on motion of appellee, which finds it had jurisdiction of the parties, and it was ordered that the motion to set aside the order of December 2, 1932, reinstating the cause be denied. The order of default and judgment against appellee was vacated and he was given leave to plead within 30 days.

July 15, appellee filed a document entitled "Plan of Defendant, JOSEPH WATKINS, divided into two parts, 'Motion' and 'Answer'. The motion was again to vacate the order reinstating the cause and the judgment. The answer part of this document avers that appellee had no knowledge of the allegations of the complaint, demands strict proof and denied liability. July 27, following, on motion of plaintiff, it was ordered that the plan of appellee be stricken, it was further ordered that the motion of appellee to set aside the court's answer

November 1, following, counsel for Maguire moved the court to strike the answer of defendant Mottle because of insufficiency, in that it amounted to the general issue which had been abolished by the Civil Practice act. On the same day an order was entered setting plaintiff's motion to strike Mottle's answer for November 21, and on that day an order was entered denying the motion, and it was ordered that Mottle plead to the claim made against him within 20 days.

December 8, Mottle filed his answer in which he denied the allegations that he had received the rugs to be cleaned. January 17, 1940, Mottle filed his petition in which he set up that it was agreed between the parties that he be permitted to examine the rugs and that he made such examination and was advised that damages claimed by plaintiff against Lux Cleaners had been settled. January 17, 1940, an order was entered on motion of attorney for Mottle giving him leave to file a supplemental answer, and on the same day a supplemental answer was filed which set up the settlement between plaintiff and defendant Lux Cleaners. January 29, 1940, an order was entered on motion of Mottle to take depositions of certain parties before a notary, and on the same day another order was entered on motion of attorney for plaintiff Maguire, which recites that it appearing to the court that no notice was served on Maguire's counsel for leave to file his supplemental answer, the supplemental answer was stricken. February 8, following, another order was entered setting the cause for trial February 15, and it was further ordered that certain parties named be directed to appear before a notary to take depositions at the instance of Mottle.

February 15, the case was called for trial as it had theretofore been set for that date, and the report of the proceedings of the trial discloses that when the case was called for trial, counsel for Mottle said: "we desire at this time to present a petition for a change of venue. THE COURT: You desire to present it at this time after all these hearings that you have had?" After some colloquy

November 1, following, counsel for plaintiff moved the court to strike the answer of defendant Wattle because of immateriality, in that it amounted to the general issue which had been abolished by the Civil Practice act. On the same day an order was entered setting plaintiff's motion to strike Wattle's answer for November 21, and on that day an order was entered denying the motion, and it was ordered that Wattle plead to the claim made against him within 30 days.

December 8, Wattle filed his answer in which he denied the allegations that he had received the note to be discussed, January 17, 1940, Wattle filed his petition in which he set up that it was agreed between the parties that he be permitted to assume the note and that he made such examination and was advised that damages claimed by plaintiff against his clearance had been settled, January 17, 1940, an order was entered on motion of attorney for Wattle giving him leave to file a supplemental answer, and on the same day a supplemental answer was filed which set up the settlement between plaintiff and defendant in clearance, January 22, 1940, an order was entered on motion of Wattle to take depositions of certain parties before a notary, and on the same day another order was entered on motion of attorney for plaintiff Wattle, which recited that it appearing to the court that no notice was served on Wattle's counsel, the date in this his supplemental answer, the supplemental answer was stricken, February 6, following, another order was entered setting the cause for trial February 18, and it was further ordered that certain parties named be directed to appear before a notary to take depositions at the residence of Wattle.

February 18, the case was called for trial as it had therefore been set for that date, and the report of the proceedings of the trial disclosed that when the case was called for trial, counsel for Wattle said: "we desire at this time to present a petition for change of venue. THE COURT: You desire to present it at this time?" After some colloquy.

counsel for the Lux Cleaners objected on the ground that the motion for change of venue came too late since the case was set for trial some time before for February 18. The court permitted counsel to file a petition for change of venue but denied the motion at the time stating to counsel for Lux Cleaners to "draw an order denying it, and counsel, set up the reason that you know of for denying it." On that date the court entered an order, apparently prepared by counsel for Lux Cleaners, in which it was stated "that the motion for change of venue has been filed for more than thirty days since the return of summons *** against *** Mottle, and there being two defendants to the action and consent to the application having not been had by at least three fourths of the parties in accordance with Section 9 of Chapter 146 Ill. Rev. Stats. 1939", it was ordered that plaintiff's petition for change of venue be denied. The case then proceeded to trial, counsel for the three parties being in court, and at the conclusion of the evidence judgment for \$500 was entered in favor of Lux Cleaners against Mottle and he appeals.

Counsel for Mottle contend the court erred in denying its petition for a change of venue on the ground that the reason stated in the order, viz., that Mottle had not complied with the provisions of par. 7, chap. 146, Ill. Rev. Stats. 1939, was unwarranted because there were only two parties at that time interested in the case. We do not stop to consider the reasons stated in the order or the argument made, because the record discloses the motion was not denied for that reason but for the reason that it had not been presented in apt time. This appears from what we have above quoted from the report of the proceedings of the trial. We think the motion for a change of venue made at the time the cause was called for hearing came too late and was properly denied. Caplow v. Caplow, 206 Ill. App. 389.

Counsel for Mottle next contend the suit having been dis-

counsel for the Tax Collector objected on the ground that the motion
for change of venue was made late since the case was not for trial
some time before the January 15. The court permitted counsel to file
a petition for change of venue not denied. The motion at the time
stating to counsel for the Tax Collector to show an order denying it, and
counsel set up the reason that was known at the hearing 12.1. On that
date the court entered an order, apparently prepared by counsel for
the Tax Collector, in which it was stated that the motion for change of
venue had been filed less than thirty days since the return of
the writ against the estate, and that under the provisions of the
act and consent to the application having not been made by at least
three-fourths of the parties in accordance with Section 2 of Chapter
124, c. 124, 1907, it was ordered that said petition be denied
for change of venue be denied. The case then proceeded to trial.
Counsel for the three parties being in court, and at the conclusion
of the evidence judgment for \$100 was entered in favor of the
Tax Collector and in against the estate.
Counsel for the estate contended the court erred in denying it
petition for a change of venue on the ground that the reason stated
in the order, viz., that the estate had not complied with the provisions
of the act, 124, c. 124, 1907, was insufficient reason.
There were only two parties at that time interested in the case. It
is not step to conclude the reasons stated in the order of the
court were made, because the record discloses the motion was not denied
for that reason but for the reason that it had not been presented in
due time. This appears from what we have above quoted from the
report of the proceedings of the trial. We think the motion for a
change of venue made at the time the cause was called for hearing
some two days and was properly denied. Carter v. Carter, 228 Ill.
App. 202.

missed for want of prosecution March 3, 1938, the court had no jurisdiction to reinstate it December 2, 1938, since more than 30 days had elapsed since the date of dismissal. If the point was properly preserved there would be merit in the contention but the error was waived by counsel when he appeared on numerous occasions having the court enter orders, ^{and} participating in the trial of the case. Landstra v. Landstra, 226 Ill. App. 293, and cases there cited.

The evidence shows the rugs were delivered by Maguire to the Lux Cleaners and the latter, not being in position at that time to clean them as requested by Maguire, turned them over for that purpose to Mottle who afterward did the work and returned them. The measure of damages in such a situation is the difference in value of the rugs at the time they were delivered to Lux and when they were returned to Maguire.

Counsel for Mottle contend the evidence is wholly insufficient on this question to sustain the judgment, and we think the contention must be sustained. This seems to have been the view of the trial judge except for the fact he was of opinion that since the evidence showed the Lux Cleaners had paid Maguire \$500, there was at least damage to that extent. (Lux testified he paid Maguire \$500 "to leave me alone.") But we think this is a misapprehension. Without going into detail on the question of evidence, we think it clearly appears that there was no evidence of the value of the rugs at the time Maguire delivered them to Lux.

Complaint is made that the evidence as to what Maguire paid for the rugs was inadmissible because such fact did not tend to prove the value of the rugs. This is not the law where goods such as rugs are bought at a fair sale. Nothing appearing to cast suspicion on the transaction, it will be presumed that the price paid is the reasonable value of the goods. Cloyes v. Platt, 231 Ill. App. 123. But in the instant case Maguire testified he had bought one of the rugs at

an auction at Hot Springs for \$2350 about six or seven years before. It was sent to be cleaned; that he bought another rug in 1925 or 1926, (which was ten years before the rugs were delivered to Lux for cleaning) for which he paid \$500 or \$575; that he bought another of the rugs from a collector; that it was a used rug; that he bought it because it was a very fine antique rug and he thought he paid \$420 for it. A witness, who was familiar with the value of such rugs as the ones in question and who seemed qualified, called by the Lux Cleaners testified he examined the rugs after they were returned from the cleaners and gave his opinion as to the value of the rugs at that time and what they would have been worth if there were not certain defects shown. Counsel for the Lux Cleaners, after analyzing the testimony of this witness says: "I disagree with appellant [Mettle] when he states that the only testimony in the record which relates to the value of the rugs in question is the testimony of Maguire as to what he paid for them and the value after bailment as testified to by the expert witness, and submit that both the value at the time the rugs were delivered to the bailee and the value at the time they were returned to the bailor was testified to by the witness, Harry Dagdigan, an expert."

We think the evidence does not sustain this argument. As stated, the rugs were purchased by Maguire - one at auction and another secondhand - a number of years before they were sent to the cleaners. They were in use during this period. The evidence as to the value of them when purchased by Maguire is wholly insufficient, and there is no evidence of their value when they were sent to the cleaners, and therefore the judgment cannot be sustained.

The judgment of the Superior court of Cook county is reversed.

JUDGMENT REVERSED.

Matchett, J., and McSurely, J., concur.

an action at Hot Springs for \$2500 about six or seven years before
it was sent to be cleaned; that he bought another rug in 1905 or 1906,
(which was the first rug he ever bought) for \$1000
cleaning) for which he paid \$200 or \$250; that he bought another of
the same from a collector; that it was a good rug; that he bought it
because it was a very fine antique rug and he thought he paid \$1000 for
it. A witness, who was familiar with the value of such rugs as the
ones in question and who seemed qualified, called by the law firm
testified he examined the rug after they were returned from the
cleaners and gave his opinion as to the value of the rug at that
time and what they would have been worth if there were not certain
defects there. (Cross) for his own statement, after examining the rug
many of this witness says: "I disagree with appellant (Terry) when
he states that the only testimony in the record which relates to the
value of the rug is the testimony of the witness as to what
he paid for them and the value after cleaning as testified to by
the expert witness, and submit that both the value at the time the
rugs were delivered to the dealer and the value at the time they were
returned to the dealer was testified to by the witness, Terry."
Terry, as expert?
He is the witness that has testified this expert, as
stated, the rug was purchased by Terry - son of appellant and
another secondhand - a number of years before they were sent to the
cleaners. They were in use during this period. The evidence as to
the value of the rug is supported by the fact that it is a very fine
there is no evidence of their value when they were sent to the
cleaners, and therefore the judgment cannot be sustained.
The judgment of the Superior Court of Cook County is
reversed.
JUDGMENT REVERSED.
Clerk, J., and McGowan, J., concur.

41314

JOHN PRABEK and JERRY BRANST,
doing business as CENTRAL
MOTOR SALES,

Appellees,

v.

FRANK C. STACH,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

307 I.A. 543^d

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought an action in the Justice of the Peace court. The justice summons recites that the "cause is an action for the payment of *** contract for garage rent for \$500." The case was tried September 19, 1938, before the justice. On September 25, the court entered judgment in plaintiffs' favor for \$500, and as a part of the judgment found there was "due the plaintiffs from the defendant *** \$500 in an action of assumpsit for monies due on a contract for garage rent." An appeal was taken by defendant to the Circuit court of Cook county where there was a trial de novo February 27, 1940, a finding and judgment in plaintiffs' favor for \$512, and defendant appeals.

Defendant contends that since the jurisdiction of the justice of the peace could not exceed \$500 (par. 16, ch. 79, Ill. Rev. Stats. 1939), and on appeal to the Circuit court where "the court finds an amount due in excess of the jurisdiction of a justice of the peace and renders judgment for that amount, its judgment is void," and Hemmingway Co. v. Meagle, et al., 181 Ill. App. 5, is chiefly relied upon. In that case suit was brought before a justice of the peace of Sangamon county on a judgment and it seems to be assumed that the jurisdiction of the justice at that time could not exceed \$200. Neither the amount claimed in the justice's summons nor the amount of the judgment rendered by the justice appears. An appeal was taken to the County court where the case was heard before the court without a jury. The court in its judgment ordered the clerk to assess damages at \$232.23; that plaintiff have and recover that amount from defendants

FOR THE PLAINTIFFS AND THEIR COUNSEL
JOHN H. HARRIS, JR.
COTTON CANYON, ARIZONA

Defendants

JOHN H. HARRIS, JR.
COTTON CANYON, ARIZONA

Defendants

307 I.A. 248

JOHN HARRIS, JR.

COTTON CANYON, ARIZONA

JOHN HARRIS, JR.

COTTON CANYON, ARIZONA

MR. HARRIS, JUDGE OF THE COURT, BEING THE PLAINTIFFS IN THE CASE OF

PLAINTIFFS' REQUEST TO THE COURT TO THE COURT TO THE COURT

court. The Justice answers that the "justice" is an action for
the amount of "the contract for the purchase of the land" and the

trial September 19, 1938, before the Justice. On September 28, the

court entered judgment in plaintiff's favor for \$200, and as a part of

the judgment found there was "due the plaintiff from the defendant"

\$200 in an action of assumpsit for money due on a contract for purchase

rent." An appeal was taken by defendant to the Circuit Court of Cook

County where there was a trial in November 27, 1938, a finding

and judgment in plaintiff's favor for \$200, and defendant appeals.

Defendant contends that since the jurisdiction of the

Justice of the Peace could not exceed \$200 (Ill. Civ. Stat. 1930, Sec. 10, Ch. 13, Ill. Rev.

Stat. 1930), and on appeal to the Circuit Court where "the court

finds an amount in excess of the jurisdiction of a Justice of the

Peace and renders judgment for that amount, the judgment is void," and

Wendell v. v. Hendrix, et al., 191 Ill. App. 2, is chiefly relied

upon. In that case suit was brought before a Justice of the Peace of

Jackson County on a judgment and it seems to be assumed that the

jurisdiction of the Justice at that time could not exceed \$200. Nothing

the amount claimed in the Justice's answer nor the amount of the

judgment rendered by the Justice appears. An appeal was taken to the

Circuit Court where the case was heard before the court without a jury.

The court in its judgment ordered the clerk to assess damages at

\$200.25; that plaintiff have and recover that amount from defendant.

and the judgment order continues, "And now on this day *** comes plaintiff *** and on its motion it is ordered by the Court that the sum of \$32.23 be and the same is remitted to said defendants out of the judgment heretofore rendered against them in this court." The court reversed the judgment holding that the County court on appeal was without jurisdiction to render judgment for more than \$200, Justice Creighton dissenting. The court there said: "Plaintiff also insists that although the original judgment was rendered for an amount in excess of the jurisdiction of the justice of the peace, that the fact that the justice of the peace originally rendered his judgment for an amount within his jurisdiction and because the remittitur entered by plaintiff in the county court reduced the amount that could afterwards be collected on the judgment to an amount for which the justice of the peace had jurisdiction, the question of jurisdiction is finally and conclusively settled. It will be conceded that if the amount due at the time that the justice of the peace rendered his judgment was for an amount within his jurisdiction, then on appeal to the county court, interest which accrues after the judgment rendered by the justice of the peace may be added to the judgment on appeal although it does thereby render the judgment in excess of the amount of which the justice of the peace had jurisdiction; but where such is the case, the record must disclose such facts; but the amount for which the county court rendered judgment is in excess of the amount for which the justice of the peace had jurisdiction with legal interest that might have accrued on the judgment rendered by him between the time of the rendition of his judgment and the hearing in the county court."

We are unable to agree with this reasoning but think Mr. Justice Creighton was right when he said he "dissents from the views herein expressed and from the conclusion arrived at." In that case, as stated, the amount sought to be recovered before the justice of

and the judgment order continuing," and now on this day "the court
affirmed" and on the motion it is ordered by the court that the
sum of \$10.00 be and the same is awarded to said defendant out of
the judgment heretofore rendered against them in this cause." The
court reversed the judgment holding that the money came on account,
as without limitation to render judgment for more than \$10.00,
justice requires dismissal. The court there said: "It is also
important that although the original judgment was rendered for an amount
in excess of the jurisdiction of the justice at the time, that the
fact that the justice of the peace originally rendered his judgment
for an amount within his jurisdiction had become the position
entered by himself in the county court reduced the amount that could
otherwise be collected on the judgment to an amount for which the
justice of the peace had jurisdiction. The question of jurisdiction is
finally and conclusively settled. It will be conceded that at the
amount due at the time that the justice of the peace rendered his
judgment was for an amount within his jurisdiction, then on appeal to
the county court, judgment with interest after the judgment rendered
by the justice of the peace may be added to the judgment on appeal,
although it does thereby render the judgment in excess of the amount
of which the justice of the peace had jurisdiction; but where such is
the case, the record must disclose such facts; but the amount for
which the county court rendered judgment is in excess of the amount
for which the justice of the peace had jurisdiction with legal in-
terest that might have accrued on the judgment rendered by him between
the time of the rendition of his judgment and the hearing in the
county court."

"We are unable to agree with this reasoning but think the
Justice Division was right when he said he "disceases from the view
herein expressed and from the conclusion arrived at." In that case,
it is stated, the amount sought to be recovered before the justice of

the peace and the amount of the judgment rendered by the justice of the peace do not appear.

On appeal from a judgment rendered by the justice of the peace interest is not to be computed on the judgment rendered by the justice of the peace but on the amount of plaintiffs' claim made in the justice court. The trial is de novo. Tindall v. Becker, 1 Kan. (2 Ill.) 137. The court there said the second error relied upon in that case for reversal was "that if the interest at the rate agreed on in the notes, was allowable, then the amount of principal and interest was over \$100, and the Court could not give judgment." In holding this contention untenable the court said: "when the action was commenced, and the judgment rendered by the justice, he had unquestionable jurisdiction of the cause. *** Now, can it for a moment be allowed, if no appeal had been taken, that the justice and constable would have been trespassers, if an execution had been issued on the judgment, and the defendant's goods taken and sold? To state the case is sufficient to show the unreasonableness of the proposition that the defendant by taking an appeal, and by subsequent delay in the Circuit Court, until the interest had accumulated so as to make the plaintiff's demand exceed \$100, such subsequent accumulation should relate back and oust the justice of jurisdiction of a cause of which when adjudicated he had legal cognizance. The rule in such cases is, if an inferior court has jurisdiction ab origine, no subsequent fact arising in the case, can defeat it, when it was lawful in the inception."

In the instant case, the suit was brought to recover \$500 - within the jurisdiction of the justice court. Judgment was entered for that amount and the fact that an appeal was taken and a judgment entered for \$10 more than the amount claimed does not oust the court of jurisdiction. The report of the proceedings of the trial is not

the record and the amount of the judgment rendered by the Justice of the Peace is not correct.

An appeal from a judgment rendered by the Justice of the Peace is not to be regarded as the judgment rendered by the Justice of the Peace but as the amount of plaintiff's claim made in the Justice court. The trial is in error. *McDonald v. McDonald*, 10 Cal. 2d 111, 124. The court there said the record error relied upon is that there was a reversal was "that in the judgment of the court agreed

as in the notes, when the amount of plaintiff's claim was over \$100, and the court could not give judgment." In holding this contention untenable the court said: "When the action was commenced, and the judgment rendered by the Justice, he had no questionable jurisdiction of the cause. The law was for a woman to allow, if no appeal had been taken, that the Justice had

jurisdiction would have been transcended, if an execution had been issued on the judgment, and the defendant's funds taken and sold. To claim the case is sufficient to show the unconstitutionality of the proposition that the defendant by failing to appeal, and by subsequent delay in

the Circuit Court, until the latest was recommended to be so held the plaintiff's demand exceed \$100, such subsequent communication should relate back and over the Justice of the Peace to a court of which when adjusted he had legal cognizance. The rule is such cases is, if an inferior court has jurisdiction of a matter, no subsequent law relating to the case, even after it, when it has been in the execution."

In the instant case, the only way through to recovery was to obtain the jurisdiction of the Justice court. Judgment was entered for that amount and the fact that an appeal was taken and a judgment entered for 10 more than the amount claimed does not overrule the court of jurisdiction. The report of the proceedings of the trial is not

in the record so that we are in the dark as to how the \$19 included in the judgment was brought about.

The judgment of the County court, as other judgments, is presumed to be in accordance with the law. Alley v. McCabe, 147 Ill. 410.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Watchett, J., and McSurely, J., concur.

In the record so that we are in the dark as to how the law is applied in the judgment was brought about.

The judgment of the county court, as other judgments, is presumed to be in accordance with the law. Wright v. Wright, 104 Ill. 410.

The judgment of the circuit court of Cook county is affirmed. Wright v. Wright.

WRIGHT, J., and WRIGHT, J., concur.

41331

JOHN SIMON,

v.

HAROLD J. GREEN, doing business
as GREEN REALTY COMPANY,

Appellant.

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

307 I.A. 543²

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against defendant to recover \$90 for work he had done for defendant as a janitor. The statement of claim set up that defendant had given plaintiff a check for the \$90 dated May 29, 1931, and signed by the "Green Realty Company, Harold J. Green."

It appeared that on the next day plaintiff went to the bank on which it was drawn but found the bank was closed and therefore the check was not paid. During the trial of the case, which was before the court without a jury, counsel for plaintiff asked leave to amend the complaint on its face to conform with the proof, i.e., to show that plaintiff had earned \$90 wages as a janitor for the month of May, 1931, and it was treated as though the amendment had actually been made.

The defense interposed was, (1) that the check was the obligation of the Green Realty Co., a corporation, and the corporation was not a party to the suit, and (2) that even if the evidence showed that defendant Green had orally promised to pay plaintiff \$90 for work done by him in May, 1931, it was barred by the Five Year Statute of Limitations.

The undisputed evidence is that the Green Realty Company was incorporated March 23, 1931. On the hearing counsel for plaintiff stated to the court that he was suing on the check signed by defendant Green "who, I believe, is an officer of the corporation." It is undisputed that the corporation was ^{not} made a party defendant.

On the second point plaintiff's evidence was to the effect that Green had orally promised to pay plaintiff \$90 for the work he

Plaintiff
 Defendant
 Plaintiff
 Defendant
 Plaintiff
 Defendant

307 I.A. 243

Appellant

Plaintiff brought suit against defendant to recover \$20 for work he had done for defendant as a janitor. The statement of claim set up that defendant had given plaintiff a check for the \$20 dated May 20, 1931, and signed by the "Green Realty Company, 1212 Broadway, New York City."

appeared that on the next day plaintiff went to the bank on which it was drawn but found the bank was closed and therefore the check was not paid. During the trial of the case, which was before the court without a jury, counsel for plaintiff asked leave to amend the complaint on its face to conform with the facts, i.e., to show that

plaintiff had secured two wages as a janitor for the month of May, 1931, and it was treated as though the amendment had actually been made.

The defense interposed was, (1) that the check was the obligation of the Green Realty Co., a corporation, and the corporation was not a party to the suit, and (2) that even if the evidence showed that defendant Green had orally promised to pay plaintiff \$20 for work done by him in May, 1931, it was barred by the five year statute of limitations.

The undisputed evidence is that the Green Realty Company was incorporated March 25, 1931. On the hearing counsel for plaintiff stated to the court that he was suing on the check signed by defendant Green "who, I believe, is an officer of the corporation." It is undisputed that the corporation was a party interested.

On the second point plaintiff's evidence was to the effect that Green had orally promised to pay plaintiff \$20 for the work he

did in the month of May, 1931. Defendant contends that the liability, if any, under this promise would be barred in five years, citing §15, ch. 83, Ill. Rev. State. 1930, which provides that actions on un-written contracts express or implied and all civil actions not otherwise provided for shall be commenced within five years next after the cause of action accrued. The instant case was brought September 1, 1939, more than eight years after the claim was due, and the claim was therefore barred.

The claim, if any, against defendant Green having been barred by the Statute of Limitations, the judgment must be and it is reversed.

JUDGMENT REVERSED.

Watchett, J., and McCurely, J., concur.

516 is the north of way, 1881. Defendant contends that the liability, if any, under this statute would be barred in five years, citing 812, ch. 83, Ill. Rev. Stat. 1880, which provides that actions on contracts entered into or implied and all civil actions and actions also provided for shall be commenced within five years next after the cause of action accrued. The instant case was brought September 1, 1880, more than eight years after the claim was due, and the claim was therefore barred.

The claim, if any, against defendant being having been barred by the statute of limitations, the judgment must be set aside and reversed.

Reversed.
JUDGMENT SET ASIDE AND CASE REVERSED.
THE COURT OF COMMON PLEAS, IN AND FOR THE COUNTY OF ALLEGANY, PENNSYLVANIA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT COPY OF THE OPINION OF THE COURT AS DELIVERED IN THE ABOVE ENTITLED CASE.
AT PITTSBURGH, PENNSYLVANIA, THIS 10TH DAY OF OCTOBER, 1880.
JAMES H. HARRIS, Clerk of the Court.

41350

In Re ESTATE OF DORA OBERHEIDE,
deceased,

WILLIAM OBERHEIDE,

Appellant,

APPEAL FROM

CIRCUIT COURT,

v.

CITY NATIONAL BANK AND TRUST
COMPANY OF CHICAGO, Executor of
the Estate of Dora Oberheide,
deceased,

COOK COUNTY.

Appellee.

307 I.A. 544

MR. PRESIDING JUSTICE O'DONNOR DELIVERED THE OPINION OF THE COURT.

February 4, 1938, William Oberheide filed his claim in the Probate court for \$10,889.03 in the matter of the estate of Dora Oberheide, his deceased mother. April 6, 1939, after hearing the claim was disallowed and an appeal taken to the Circuit court of Cook county where the matter was heard, substantially all the evidence being introduced on behalf of claimant. The claim was again disallowed and he appeals.

The record discloses that Dora Oberheide owned all the capital stock of the Oberheide Coal Company, a corporation, and her three sons, the claimant William and his brothers Fred and Christian were officers and directors of the coal company and in the active management of the business. January 9, 1930, she and her three sons entered into a written agreement whereby she was to execute and deliver a trust agreement under the terms of which she would assign all of the shares of the coal company to a trustee. The sons were to continue to manage the coal business as officers and directors and to work harmoniously together. There were to be two other directors of the coal company whose duties were chiefly to act as arbitrators in case of any disagreement among the sons. The contract also provided that "If the surplus and earnings of the *** Coal Company, as certified to by a duly licensed public accountant, shall warrant such action, each of the second parties [the three sons] shall vote in favor of the declaration of quarterly dividends by the board of

IN THE COURT OF THE DISTRICT OF COLUMBIA

THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D.C.

307 I.A. 544

ON PETITION TO REVOKE PROBATION GRANTED TO ALVIN KARPIS, et al.,
 February 4, 1935, William Joseph Tamm filed his petition in the
 Federal Court for the District of Columbia in the case of Karpis
 et al., No. 10,000. On April 2, 1935, after hearing the case
 on the merits, the court granted the petition and an appeal was
 allowed and an appeal taken to the District Court of Cook County
 where the matter was heard, substantially all the evidence being in-
 tended on behalf of appellant. The case was again allowed and
 an appeal.

The record discloses that John D. Rockefeller owned all the
 capital stock of the Chesapeake and Potomac Telephone Company, and that
 three sons, the youngest William and his brothers Fred and Charles
 with officers and directors of the coal company and in the active
 management of the business. January 3, 1935, the said three sons
 entered into a written agreement whereby the said three sons and de-
 liver a trust agreement under the terms of which the would retain
 all of the shares of the coal company to a trustee. The sons were to
 continue to manage the coal business as officers and directors and
 to work harmoniously together. There were to be two other directors
 of the coal company whose duties were solely to act as substitutes
 in case of any disagreement among the sons. The contract also pro-
 vided that "if the earnings and savings of the *** coal company, as
 certified to by a duly licensed public accountant, shall without such
 action, and of the income parties [the three sons] shall vote in
 favor of the declaration of quarterly dividends by the board of

Directors at the rate of at least Twelve Thousand Dollars (\$12,000.00) in each year commencing January 1, 1929," until the death of Mrs. Oberheide. In addition thereto the contract provided for back dividends for any preceding year in which dividends of \$12,000 had not been declared.

At the same time, January 9, 1929, Dora Oberheide entered into a written trust indenture with the Central Trust Company of Illinois, whereby all of the stock of the coal company which belonged to Mrs. Oberheide, was transferred and certificates issued to the Central Trust Company to be held by it as trustee, and it was required to vote the shares of stock for the election of the three sons as directors of the coal company and after the deduction by it of its fees and expenses, was to pay Mrs. Oberheide the dividends received by it from the coal company until such dividends amounted to \$12,000 in each calendar year. On the death of Mrs. Oberheide the trustee was to distribute the shares of stock equally among the three sons. At the time of the execution of these two documents, Mrs. Oberheide was about 79 years old. She died January 5, 1937, at the age of 87.

Claimant's theory of the case is that immediately before the execution of the two documents, the sons, after reading the agreement "objected to and refused to accept that provision of the agreement respecting the payment of \$12,000 dividends because business conditions did not warrant it." Thereupon it was orally agreed that if the dividends earned did not amount to \$12,000 a year Mrs. Oberheide would hold in trust for the three sons the balance of the \$12,000 after deducting the amount of the dividends earned. Upon this oral agreement being reached, the written agreement was executed by the mother and the three sons.

On the hearing it was stipulated that the dividends declared by the coal company for the years 1932 to 1936, both inclusive, and paid by it to the Central Trust Company, as trustee (who in turn paid Mrs. Oberheide), exceeded the dividends earned by \$21,787.10

dividends at the rate of at least five percent (\$10,000.00) in each year commencing January 1, 1937, until the death of Mrs. [redacted]. In addition thereto the dividend payable for each dividend for any preceding year in which dividends of \$10,000.00 had not been declared.

At the said time, January 1, 1937, Mrs. [redacted] executed a written trust instrument with the Central Trust Company of Illinois, whereby all of the stock of the said company which belonged to Mrs. [redacted], was transferred and certificated issued to the Central Trust Company to be held by it as trustee, and it was required to vote the shares of stock for the election of the three sons as directors of the said company and after the election by it of 1937, and expenses, was to pay Mrs. [redacted] the dividends received by it from the said company until such dividends amounted to \$10,000.00 in each calendar year. On the death of Mrs. [redacted] the trustee was to distribute the shares of stock equally among the three sons. At the time of the execution of these two documents, Mrs. [redacted] was about 70 years old. She died January 8, 1937, at the age of 87.

Claimant's theory of the case is that immediately before the execution of the two documents, the sons, after reading the same, had objected to and refused to accept that provision of the same which provided for the payment of \$10,000.00 dividends to Mrs. [redacted] until such dividends amounted to \$10,000.00 a year. Whereupon it was orally agreed that if the dividends earned did not amount to \$10,000.00 a year Mrs. [redacted] would hold in trust for the three sons the balance of the \$10,000.00 after deducting the amount of the dividends earned. Upon this oral agreement being reached, the written agreement was executed by the mother and the three sons.

On the hearing it was stipulated that the dividends do-
[redacted] by the said company for the year 1937 in 1938, Mrs. [redacted] was paid by it to the Central Trust Company, as trustee for the three sons. [redacted] the dividends earned by \$10,707.10

and William, the son, claims one-third of this amount or \$10,589.03 to be due from his mother's estate. On the oral argument it was stated that the other two sons have similar claims pending for the other two-thirds.

Frank L. Hume, a lawyer practicing at the Chicago bar for more than 30 years, called by claimant testified he knew Mrs. Oberheide in her lifetime, her family, and also Mr. D. M. Mann, the attorney who prepared the two documents; that he was present January 9, when the two documents were signed; that Mr. Mann drew the contract and trust agreement; that at the meeting there were present Mrs. Oberheide, Mr. Mann, the three sons and Sophia Knoepfel, a daughter; that the papers were examined; that the three sons objected to one provision of the contract which provided for annual dividends of \$15,000, and stated they would not accept that provision for the reason that the coal business did not warrant such annual dividends; that Mr. Mann then stated there could be no change in the contract because he had devoted too much time to the preparation of it and of the trust agreement. Thereupon Mrs. Oberheide said she would not expect any dividends if none were earned: "I won't expect my boys to pay anything they do not earn;" that with this understanding, the contract was then executed. Mr. Hume was the only one present at the meeting who testified as to what was said at that time. Counsel for claimant sought to have the three sons testify but, on objection, they were held incompetent and thereupon counsel for claimant made an offer as to what their testimony would be, but no point is made in this court that the court erred in refusing to permit them to testify.

Claimant called Clara Blumenhagen, a daughter of Mrs. Oberheide and sister of the three brothers, who testified that in February, 1936, she was at her mother's home in Chicago and the three sons were there at the time; that her brother "Chris" said to his mother: "We cannot pay you the dividends any longer, as the business does not allow it;" that the coal business lost money in 1935 and would

and Illinois, the son, claimed ownership of this amount as his, \$100,000, to be due from his mother's estate. He also testified that he was stated that the other two sons have similar claims pending for the other two-thirds.

Frank M. Kane, a lawyer, residing at the Chicago Bar for more than 20 years, called by claimant testified he knew Mr. O'Connell in New Orleans, New York, and also Mr. J. J. Kane, the attorney who prepared the two documents; that he was present February 1, 1932, when the two documents were signed; that he knew both the witnesses and their signatures; that at the meeting there were present Mr. O'Connell, Dr. Kane, the three sons and Captain Buchanan, a daughter; that the papers were examined; that the three sons objected to one provision of the documents which provided for annual dividends of 12, 10, and 8 per cent, but which was amended to read that the coal business did not warrant such annual dividends; that Mr. Kane then stated there would be no change in the contract because he had devoted too much time to the preparation of it and of the first agreement. Thereupon Mr. O'Connell said she would not pay most any dividends if none were earned: "I can't expect my boys to pay anything (they) not say," that after this understanding, the contract was then executed. Mr. Kane was the only one present at the meeting who testified as to what was said at that time, because the claimant sought to have the three sons testify but on objection, they were held incompetent and therefore counsel for claimant made an offer as to what their testimony would be, but no point is made in this court that the court erred in refusing to permit them to testify.

Claimant called Oliver Buchanan, a daughter of Mr. O'Connell and sister of the three brothers, who testified that in February, 1932, she was at her mother's home in Chicago and the three sons were there at the time; that her brother "Orie" said to her "I cannot pay you the dividends any longer, as the business was not alive"; that the coal business lost money in 1932 and would

loss more in 1936, and he said: "You know the agreement we made with you about the dividends." So mother said, 'Yes, boys, the dividends that you paid me that the company did not earn, I am holding that money in trust for you boys, and as I promised you when we made that trust agreement, when we signed that trust agreement, I am going to give each of you boys one-third as you worked hard for it.'" The witness further testified she had another conversation with her mother at the latter's home in December, 1936, the Friday before Christmas; that she was called to her mother's home by her sister, Dora; that the mother was not well and they needed a nurse "So I stayed there *** for eleven days;" that she sat with her mother in the bedroom all alone. "Mother said to me, *** 'Clara, I am not going to last much longer, *** I want the household here, everything, to be shared with the two girls. I want you to take whatever you want, and the boys will get more than you will ever get, *** The boys, you know the dividends that they gave me that they did not earn, I am holding that money in trust as I promised them, and I am going to give each boy one-third as they have worked for it.'"

Otto A. Gerstung called by claimant testified he was in the business of "boiler making and heating;" that he knew Mrs. Oberheide in her lifetime and had a conversation with her in October, 1938, when he put a heating device in her home; that no one else was present; that she asked him to sit down in her living room, which he did, and they talked about things in general; that she told him she and her sons had entered into "an agreement on the dividends" - the boys were to pay her each year; that she asked him if the business wasn't doing well and he said "Yes, you should be happy to have boys that work as hard for business as they do;" that she said: "'pa, if he were living today, would also be pleased.' She said, 'I am pleased and happy about the whole thing.' Nothing else was said about the dividends at that time." He further testified that he spoke to Mrs. Oberheide in February 1939, when he was in St.

loss were in 1938, and he said: "You know the agreement we made with
 you about the dividends? We never said, 'Yes, boys, the dividends
 that you paid me that the company did not care, I am holding that
 money in trust for you boys, and as I promised you when we made that
 trust agreement, when we signed that trust agreement, I am going to
 give each of you boys one-third as you worked hard for it.'"
 witness further testified she had another conversation with her mother
 at the latter's home in December, 1938, the Friday before Christmas;
 that she was called to her mother's home by her sister, Janet; that the
 mother was not well and they needed a nurse "so I stayed there"
 for eleven days; that she sat with her mother in the bedroom all
 alone. "Mother said to me, 'Helen, I am not going to last much
 longer.' I said the beautiful lady, everything, to be sure, was
 the two girls. I want you to take whatever you want, and the boys
 will get more than you will ever get." The boys, you know the
 dividends that they gave me that they did not care, I am holding that
 money in trust as I promised them, and I am going to give each boy
 one-third as they have worked for it."
 Otto A. Gerstung called by witness testified he was in
 the business of "oilier" work and machinery, that he knew the
 Gerstungs in her lifetime and had a conversation with her in October,
 1938, when he put a heating device in her home; that no one else was
 present; that she asked him to sit down in her living room, which he
 did, and they talked about things in general; that she told him she
 and her sons had entered into "an agreement on the dividends" - the
 boys were to pay her each year; that she asked him if the business
 wasn't doing well and he said "Yes, you should be happy to have
 this thing done as long as the business is doing well," and she said "I
 am so happy living today, would also be pleased," she said, "I am
 pleased and happy about the whole thing." Nothing else was said
 about the dividends at that time. He further testified that he
 spoke to her, Gerstung, in February 1938, when he was in St.

Petersburg, Florida, living near Mrs. Oberheide's home at that place; that the three daughters and the mother were living together; that he had a conversation with Mrs. Oberheide one morning when he went in to bid her the time of day; that she said the three daughters were at the hairdressers; that she called him "Otto;" that she knew him as a boy and asked him to sit down that she wanted to talk to him; that he said "All right, Ma, what have you got on your mind?" She said, 'You know, Otto, the boys have an agreement with me,' she said, 'Last year,' which was 1932, *** 'they paid me really more than they earned.'*** I can't see why they paid me more than they earned, but they did. *** after it is all said and done, *** The money they make I am holding it for them. *** They worked for it and they are entitled to it. *** I am giving it to them. ' That he then said 'I think they are entitled to it because they worked for it, they worked hard. *** You know other coal companies have also been in the same boat."

There was no cross-examination of any of these witnesses. This is substantially all of the material evidence in the record.

We think the evidence was insufficient to create a trust, but in any view of the case we are clear we would not be warranted in disturbing the finding of the court to the effect that there was no trust created. We saw the witnesses testify, as apparently did the judge of the Probate court. Both found against claimant and what we said in Dease v. Leahy, 279 Ill. App. 178, we think applicable here: "It has long been well settled that courts lend a very unwilling ear to statements of witnesses as to what dead people have said." We also in re Estate of Carlson, 236 Ill. App. 81 (affirmed Morson v. Est. of Carlson, 366 Ill. 482); Lea v. Folk County Copper Co., 68 O. S. 493; 22 Corpus Juris, p. 291; Laurence v. Laurence, 164 Ill. 367; Fierke v. The Elgin City Banking Co., 366 Ill. 60; In re Estate of Hanson, 304 Ill. App. 187; Meggins v. Meggins, 367 Ill. 168.

In the Morson case our Supreme court said: "In an action to

recover against an estate upon an express contract to make a testamentary provision, uncontradicted testimony may be rejected if not clear and convincing. (McKeon v. Van Slyck, 323 N. Y. 392.) This court, in Laurence v. Laurence, 164 Ill. 387, well said: 'Evidence of admissions made by a person since dead should be carefully scrutinized, and the circumstances under which they were alleged to have been made carefully considered with all the evidence in the case. Such evidence is liable to abuse.' The Supreme Court of the United States, in Lee v. Folk County Copper Co., 62 U. S. 493, observed that 'courts of justice lend a very unwilling ear to statements of what dead men have said.'"

This rule of law is particularly pertinent to the testimony of Clara Blumenhagen and Otto Gerstung. Clara's testimony is that she talked to her mother in February, 1936, and December of the same year, in which conversations her mother said she was holding the money in trust for the boys as she had promised to do when they made the trust agreement. This was more than seven years after the contract was made and this witness further testified that the mother said: "I am going to give each boy one-third as they have worked for it," which if true would only mean she was going some time in the future to make a gift of the money to the boys.

The witness Gerstung's testimony was that he talked to Mrs. Oberheide in February, 1933, when Mrs. Oberheide was holding the money for the boys and said: "I am giving it to them." We think this testimony was wholly insufficient to establish the contention made by the claimant that a trust had been established for the boys by their mother in 1929.

It must also be borne in mind that attorney Summ, who knew the parties and who was present at the time the contract was executed, makes no mention that Mrs. Oberheide said she would hold any excess of dividends paid to her in trust for the boys. His testimony is that she said: "I won't expect my boys to pay anything they do not earn." So that the testimony of this witness can in no way be said to establish the creation of any kind of a trust.

The judgment of the Circuit court of Cook county is affirmed. Hatchett, J., and McFarley, J., concur. JUDGMENT AFFIRMED.

recover against an estate upon an agreement contained in such a deed.
 contrary provision, uncorroborated testimony may be rejected if not
 clear and convincing. Johnson v. Johnson, 100 Ill. 2d 111, 257, well said: "The balance of
 court, in Johnson v. Johnson, 100 Ill. 2d 111, 257, well said: 'The balance of
 admissions made by a person since death should be carefully considered,
 and the circumstances under which they were alleged to have been made
 carefully considered with all the evidence in the case. Such evidence
 as is in issue.' The Supreme Court of the United States, in Id.
v. John Connelly, 300 U. S. 453, observed that 'evidence of
 Justice tend a very unwilling ear to statements of what said men have
 made.'
 This rule of law is pertinaciously insisted on the testimony
 of Clara Blanche and Otto Gersbach. Clara's testimony is that
 she talked to her mother in February, 1933, and brother of the same
 year, in which conversation her mother said she was holding the
 money in trust for the boys as she had promised to do when they made
 the trust agreement. This was more than seven years after the con-
 tract was made and this witness further testified that the mother
 said: "I am going to give each boy one-third as they have worked for
 it," which it was said only once the one third was in the
 future to make a gift of the money to the boys.
 The witness Gersbach's testimony was that he talked to her
 sometime in February, 1933, when Mrs. Gersbach was holding the money
 for the boys and said: "I am giving it to them." We think this
 testimony was wholly insufficient to establish the contention made by
 the claimant that a trust had been established for the boys by their
 mother in 1929.
 It must also be borne in mind that attorney Hume, who knew
 the parties and who was present at the time the contract was executed,
 gave no evidence that Mrs. Gersbach said she would hold any money
 at any time held to her in trust for the boys. His testimony is that
 she said: "I can't repeat up to me for anything that we have."
 He had the testimony of this witness even in no way be said to
 establish the creation of any kind of a trust.
 The judgment of the District Court of Cook County is affirmed.

41304-41390

CHARLES H. ALBERS, Receiver, etc.,
Appellee,

v.

ANDREW H. DRESSEL, et al.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

ANDREW H. DRESSEL and JULIA SCHANZ,
Appellants.

Consolidated with

Consolidated

BERNARD HORWICH, etc.,
Appellee,

v.

ANDREW H. DRESSEL, et al.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

ANDREW H. DRESSEL and JULIA SCHANZ,
Appellants.

307 I.A. 544²

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal certain defendants seek to reverse two decrees entered in Cerebellum suits which have been consolidated for hearing upon one set of abstracts and briefs.

One of the suits was to foreclose a trust deed given by Andrew H. Dressel on one-half of his farm to secure an indebtedness of \$48,000, and the other to secure an indebtedness of \$35,000 on the other half of the farm.

Counsel for defendants in this court say, "There is no question made by this record in this cause upon the evidence. The matter was tried before Master in Chancery, a report by such Master culminating in a decree of sale.

"The question here involved is one of pleading. and There is no allegation of possession or ownership or right, title or interest in and to the note and indebtedness in question alleged to be set forth in either of the complaints."

In support of defendants' contention counsel say, "The one question involved in this proceeding is the failure of the plaintiff

to show any ownership or title to the chose in action. A careful scrutiny of the pleadings, to wit: the original bill of complaint in the Superior Court case and the amended bill of complaint in the Circuit Court case fail utterly to show any right, title or claim in the plaintiff against the defendant or any title or ownership of the note in question to be in the plaintiff." The argument seems to be that because of the failure to allege ownership of the notes and trust deed the decree cannot stand although the evidence may show the ownership of the notes.

This is all the argument in the brief and no reference is made to any particular allegations of the bills, but we are left to search the record to see whether counsel's argument is supported when we examine the complaints. It is not the duty of the court to search through the record to see if it can find errors in the allegation. This is the work of counsel and the decree appealed from might be affirmed without saying more. However, we have looked into the allegations of the complaints and find that each was brought by the receiver of a bank which was being liquidated, and in each copies of the notes and trust deed were attached to and made a part of the complaint and the receiver alleged they would be produced in open court. In one complaint it was alleged the receiver was the owner and holder of the principal note on which there was a balance of \$40,000 due and unpaid, and in the other complaint it was alleged there was now due the complainant \$50,000 on the other mortgage indebtedness. There is no merit in the contention. The production of the notes by plaintiff in the two suits was prima facie evidence of ownership in plaintiff. Henderson v. Davidson, 187 Ill. 379; Dilling v. Elmore, 361 Ill. 324; Kasman v. Wright, 255 Ill. App. 254. No objection having been raised in the trial court to the sufficiency of the pleadings, it cannot be urged for the first time in a court of review. Brandtzen & Elmer, Inc. v. Forgas, 290 Ill. App. 107; ~~Brandtzen & Elmer, Inc. v. Forgas~~

Knobloch v. Farrell, 299 Ill. App. 279.

In the Brandtzen & Blum, Inc., case we said: "The deficiency of the statement of claim may not be raised for the first time in the Appellate Court. Sec. 42 of the Civil Practice Act, 110, par. 166, Ill. Rev. State, 1937, provides: '(3) All defects in pleadings, either in form or substance, not objected to in the trial court, shall be deemed to be waived.'" To the same effect is Allen v. Rembrandt, 300 Ill. App. 178; Jordan v. Jack Leather Bel. Mfg. Co., 300 Ill. App. 208; Craw v. Irwin, Inc., 303 Ill. App. 215.

The ground alleged for reversal is frivolous and wholly without merit and it is clearly apparent the appeals were prosecuted merely for delay.

The decrees appealed from are affirmed.

DECREES AFFIRMED.

Matchett, J., and McSurely, J., concur.

41453

DAGNY EIZENMAN,

Appellee,

v.

ONE KYPROS, doing business as
IDEAL MEAT MARKET and 1805
EAST 71ST STREET BUILDING
CORPORATION, a Corporation,

ON APPEAL OF 1935 EAST 71ST
STREET BUILDING CORPORATION, a
Corporation.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

307 I.A. 545¹

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendants to recover damages for personal injuries claimed to have been sustained by her in slipping and falling on the walk in the entranceway leading from the sidewalk into a butcher shop conducted by defendant Kypros, who was the tenant of the other defendant, the 1935 East 71st Street Building Corporation. There was a jury trial and a verdict and judgment in defendants' favor. Afterward the court set aside the judgment and verdict and awarded a new trial from which we have allowed the Building Corporation to appeal. Kypros the other defendant is not before us.

At the conclusion of the instructions the court submitted two forms of verdict to the jury, (1) "We, the jury, find the defendants not guilty," and (2) "We, the jury, find the defendants guilty and assess the plaintiff's damages at the sum of _____ Dollars."

The record discloses that at the conclusion of the argument of counsel, on plaintiff's motion for a new trial, the court said:

"As one of the grounds for a new trial, plaintiff urged in substance that the court erred in submitting to the jury only two forms of verdict, one, finding both defendants guilty and assessment of damages; and second, to find both defendants not guilty.

"On consideration of the foregoing point, the Court sustains

UNITED STATES

DEPARTMENT OF JUSTICE

IN RE: JAMES EARL RAY,
 Defendant.
 IN RE: THE UNITED STATES
 OF AMERICA, Plaintiff.

IN RE: THE UNITED STATES
 OF AMERICA, Plaintiff.

805 I.A. 7-17

THE UNITED STATES OF AMERICA, Plaintiff, by and through the undersigned attorneys, do hereby move the court for an order directing the defendant to answer the following questions:

1. Whether the defendant is a citizen of the United States;
 2. Whether the defendant is a resident of the United States;
 3. Whether the defendant is a member of the Communist Party of the United States;
 4. Whether the defendant is a member of the Southern Christian Leadership Conference;
 5. Whether the defendant is a member of the Black Panther Party;
 6. Whether the defendant is a member of the Black Liberation Movement;
 7. Whether the defendant is a member of the Black Power Movement;
 8. Whether the defendant is a member of the Black Nationalist Movement;
 9. Whether the defendant is a member of the Black Revolutionary Movement;
 10. Whether the defendant is a member of the Black Socialist Movement;
 11. Whether the defendant is a member of the Black Communist Movement;
 12. Whether the defendant is a member of the Black Fascist Movement;
 13. Whether the defendant is a member of the Black Nazi Movement;
 14. Whether the defendant is a member of the Black Hitler Movement;
 15. Whether the defendant is a member of the Black Stalin Movement;
 16. Whether the defendant is a member of the Black Mao Movement;
 17. Whether the defendant is a member of the Black Lenin Movement;
 18. Whether the defendant is a member of the Black Marx Movement;
 19. Whether the defendant is a member of the Black Engels Movement;
 20. Whether the defendant is a member of the Black Bakunin Movement;
 21. Whether the defendant is a member of the Black Proudhon Movement;
 22. Whether the defendant is a member of the Black Fourier Movement;
 23. Whether the defendant is a member of the Black Owen Movement;
 24. Whether the defendant is a member of the Black Saint-Simon Movement;
 25. Whether the defendant is a member of the Black Comte Movement;
 26. Whether the defendant is a member of the Black Fourier Movement;
 27. Whether the defendant is a member of the Black Owen Movement;
 28. Whether the defendant is a member of the Black Saint-Simon Movement;
 29. Whether the defendant is a member of the Black Comte Movement;
 30. Whether the defendant is a member of the Black Fourier Movement;

Respectfully,
 JAMES EARL RAY

AT THE conclusion of the last session of the court submitted
 two copies of verified to the jury, (1) the jury, find the defend-
 ants not guilty, and (2) the jury, find the defendants guilty.
 The court directed that at the conclusion of the session
 of court, the plaintiff's motion for a new trial, the court said:
 "The one of the grounds for a new trial, the plaintiff's motion for a new trial, is submitted to the jury and the jury has found that the court was in error in submitting to the jury only two copies of verified, and finding that defendant guilty and convicting of murder, and finding, in this case defendant not guilty.
 The conviction of the defendant, the court ordered

the contention and grants a new trial herein solely on the foregoing ground."

There is considerable argument in the briefs as to whether defendants were charged in the complaint with joint negligence or whether, as counsel for plaintiffs says: "It should be noted that the Declaration and Amended Declaration charge both defendants with two separate and distinct liabilities. The occupant, Kyproe, is charged with general negligence. The other, the petitioner, the owner, is charged with leasing defective premises with knowledge of such defect, etc." Counsel for defendant, the Building Corporation, say that under the evidence it was entitled to a directed verdict at the close of all the evidence because it showed there was no negligence on its part. For the purpose of this decision we shall assume that the cause was properly submitted to the jury. Even if the complaint charged defendants with joint negligence, yet the jury might find one defendant guilty and the other not guilty. Linguiet v. Hodges, 248 Ill. 491; Covenant Club of Chicago v. Thompson, 247 Ill. App. 122; Bkala v. Lehen, 288 Ill. App. 262 (affirmed 343 Ill. 602); Fearlman v. W. O. King Lumber Co., 302 Ill. App. 190.

It is conceded that verdicts should have been submitted to the jury so that it might find either of defendants guilty or not guilty and if counsel for plaintiff was without fault in the two forms of verdicts which were submitted, the motion for a new trial was properly allowed. But counsel for defendant say that before the jury retired the record discloses that defendant's counsel who was trying the case requested the court to submit additional forms of verdicts so that either of defendants might be found guilty or not guilty but that this was objected to by counsel for plaintiff, and therefore he cannot take advantage of the error complained of. Counsel for plaintiff says that when counsel for defendant requested additional forms of verdict, the jury had retired and therefore it was too late, but we think this is not borne out by the record.

the contention and grounds a new trial herein solely on the foregoing grounds.

There is considerable agreement in the courts as to whether

defendants who charged in the complaint with joint negligence or, whether, as counsel for plaintiff says: "It should be noted that the petition and amended petition charge both defendants with two separate and distinct liabilities. The complaint, however, is charged with general negligence. The other, the petition, the

complaint, is charged with issuing defective products with knowledge of such defect, etc." Counsel for defendant, the petition, petition, say that under the evidence it was entitled to a directed verdict at the close of all the evidence because it showed there was no negligence on its part. For the purpose of this motion we shall assume

that the case was properly submitted to the jury. Even if the complaint charged defendants with joint negligence, yet the jury might find one defendant guilty and the other not guilty. Johnson v. Johnson, 240 Ill. 441; Johnson v. Johnson, 240 Ill. 441.

Johnson v. Johnson, 240 Ill. 441; Johnson v. Johnson, 240 Ill. 441; Johnson v. Johnson, 240 Ill. 441; Johnson v. Johnson, 240 Ill. 441.

It is conceded that verdicts should have been submitted to

the jury so that it might find either of defendants guilty or not guilty and it counsel for plaintiff was without fault in the two forms of verdicts which were submitted, the action for a new trial was properly allowed. But counsel for defendant say that before the jury

retired the record discloses that defendant's counsel who was having the same requested the court to submit additional forms of verdicts so that either of defendants might be found guilty or not guilty but that this was objected to by counsel for plaintiff, and therefore he cannot

take advantage of the error complained of. Counsel for plaintiff says that when counsel for defendant requested additional forms of verdict, the jury had retired and therefore it was too late, but we think this

is not correct and we are of the opinion that the court should have submitted the verdicts to the jury.

The record discloses that after the jury was instructed and the two forms submitted, as above stated, ^{and} the exhibits were gathered up for the jury to take with them, the court said: "All right. You may retire, ladies and gentlemen. (The jury thereupon retired.) (Discussion by Court and counsel off the record.) The Court: All right, make your point. Mr. Wright [counsel for defendant Building Corporation]: I want the record to show there are only two forms of verdict going. I think there should be a form of verdict for each defendant. The Court: No, I think it is a joint suit. There should be a joint verdict. Mr. Herzon [plaintiff's counsel]: It is a joint suit. I agree with the Court. *** Mr. Wright: I object to the forms of verdict sent by the Court to the jury room with the jury, for the reason that it would be impossible to find one defendant only not guilty and the other defendant guilty. The Court: I think it should be a joint verdict. Mr. Wright: And I object to sending joint verdicts only. Mr. Rudnick [counsel for defendant Kypros]: I object to the Court sending one type of Not Guilty verdict to the jury on the ground that it is not in harmony with the instructions given by the Court, which pertain in some instances to each defendant separately, and also because it does not permit the jury to find one of the defendants not guilty. Mr. Wright: I join in that objection, too."

The jury returned their verdict on the same day, April 25, 1940, finding defendants not guilty. Afterward counsel for plaintiff filed a motion for a new trial specifying, among other grounds, that the court erred in submitting the two forms of verdict. The motion was overruled July 1, 1940, and on the next day plaintiff moved to set aside this order. The matter was heard July 8, the motion for new trial sustained, and this appeal followed.

On the rehearing, July 8, of plaintiff's motion for a new trial counsel for the Building Corporation called the court's attention

The record discloses that after the jury was instructed and the two forms submitted, as above stated, the exhibits were taken up for the jury to take with them, the court said: "All right, for my review, ladies and gentlemen. (The jury foreperson retired.) (Discussion by court and counsel off the record.) The court: All right, same your honor. The court: (The court: All right.)

Corporation: I want the record to show there are only two forms of verdict being. I think there should be a form of verdict for each defendant. The court: No, I think it is a joint verdict. There should be a joint verdict. Mr. Nathan [counsel for defendant Nathan]: It is a joint verdict. I agree with the court. Mr. Wright: I object to the form of verdict sent by the court to the jury room with the jury, for the reason that it would be impossible to find one defendant only not guilty and the other defendant guilty. The court: I think it would be a joint verdict. Mr. Wright: And I object to sending joint verdicts only. Mr. Nathan [counsel for defendant Nathan]: I object to the court sending one type of not guilty verdict to the jury on the ground that it is not in harmony with the instructions given by the court, which provide in some instances to each defendant separately, and also because it does not permit the jury to find one of the defendants not guilty. Mr. Wright: I join in that objection, too.

The jury returned their verdict on the same day, April 23, 1940, finding defendant not guilty. Afterward counsel for plaintiff filed a motion for a new trial specifying, among other grounds, that the court erred in submitting the two forms of verdict. The motion was overruled July 1, 1940, and on the next day plaintiff moved to set aside this order. The matter was heard July 5, the motion for new trial sustained, and this appeal followed.

On the reversing July 8, of plaintiff's motion for a new trial counsel for the Building Corporation called the court's attention

to the fact that he had objected to only two forms of verdict being submitted to the jury and suggested others, but that counsel for plaintiff said: "No, the forms of verdict are proper." Counsel for plaintiff then said that the court, after instructing the jury "unknown to all counsel in the case, submitted two forms of verdict *** Immediately following this submission of these two verdicts or these two forms of verdict, the Court instructed the jury to select a foreman and retire to proceed with the consideration of the case.

"Just at that moment counsel for defendant objected to the forms of verdict, and there was discussion between the Court and counsel, in which discussion I have also joined as counsel for plaintiff, and I suggested to the Court that it is a joint suit.

"About that time, if your Honor please, the jurors were rising, and while this discussion was going on the jurors retired to their jury room."

From the foregoing we think that the failure to submit the additional forms of verdict to the jury was brought about, in part, by counsel for plaintiff before the jury retired but even if the jury had just retired, it would not have been too late to submit the other forms, before a consideration of the case was begun by the jury.

Since the verdict returned was against plaintiff we think, under the circumstances, she ought not now be permitted to contend that other forms of verdict should have been submitted to the jury.

For the reasons stated, the order of the Superior court of Cook county awarding a new trial is reversed and the matter remanded to the trial court with directions to enter judgment on the verdict.

REVERSED AND REMANDED WITH DIRECTIONS.

Matchett, J., and McSurely, J., concur.

to the fact that he had suggested in only two forms of verdict being submitted to the jury and suggested others, but that counsel for plaintiff then said that the court, after instructing the jury "and because to all counsel in the case, submitted the form of verdict immediately following this submission of three two verdicts or three two forms of verdict, the court instructed the jury to select a two-man and retire to proceed with the consideration of the case."

"Just at that moment counsel for defendant objected to the form of verdict, and there was discussion between the court and counsel, in which discussion I have also joined as counsel for plaintiff, and I suggested to the court that it is a joint verdict."

"That's all right, if your honor please, the court was ruling, and while this discussion was going on the witness retired to select jury room."

"From the foregoing we think that the failure to submit the additional form of verdict to the jury was brought about, in part, by counsel for plaintiff before the jury retired but even if the jury had just retired, it would not have been too late to submit the other form, before a consideration of the case was begun by the jury, since the verdict returned was against plaintiff we think, under the circumstances, the court not now be permitted to contend that some form of verdict should have been submitted to the jury, for the witness stated, the judge at the witness' request took counsel suggesting a new trial in retirement and the witness returned to the trial court with discussion in every judgment of the verdict."

"RETURNED AND DISMISSED WITH DISCRETION."

"RECEIVED, J. J. AND SISTER, J. J. WARD."

41883

VILLAGE OF OAK PARK, ILLINOIS,
a Municipal Corporation,

Appellee,

v.

GRACE A. PRUGEN,

Appellant.

APPEAL FROM

CRIMINAL COURT,

COOK COUNTY.

307 I.A. 545²

MR. JUSTICE McDERMOT DELIVERED THE OPINION OF THE COURT.

Defendant, in a jury trial before a Justice of the Peace, was found guilty of violating the zoning ordinance of the Village of Oak Park and fined \$25; she appealed to the Criminal Court, where upon trial by the court she was again found guilty and fined \$25; she appeals to this court.

Section 929 of the zoning ordinance divides Oak Park into four use districts. Section 930 defines Residence District "A" as permitting, among other things, "Dwellings, provided also that such dwellings shall be arranged and designed for the exclusive use of only one family." Defendant, who lived in a one family dwelling in District A, at 1088 Superior street, Oak Park, was charged with violating the ordinance by using another building at the rear of the premises as a three family dwelling.

The entire zoning ordinance, passed in 1921, was placed in evidence. Sub-paragraph 45, section 35.09, Article II defines a non-conforming building or use as one that does not conform with the regulations of the use district in which it is situated. Section 934, dealing with non-conforming uses, provides:

"The lawful use existing at the time that this ordinance takes effect of a building or premises may be continued, although such use does not conform with the provisions hereof.

"Any building existing at the time that this ordinance takes effect, arranged or designed, or at that time devoted to a non-conforming use, may be reconstructed or structurally altered, provided such structural alterations shall cost an amount not to exceed fifty (50) per cent of the value of the building, and provided also that the

COUNTY
 1807 12 24
 Question

MR. JUSTICE HONORABLE...
 defendant, in a jury trial before a Justice of the Peace,
 was found guilty of violating the zoning ordinance of the Village of
 Oak Park and fined \$25; the appeal to the District Court, where there
 was a trial by the court, the case again found guilty and fined \$25; the
 appeal to this court.
 Section 902 of the zoning ordinance provides that no one
 shall be disturbed. Section 903 defines "disturbance" as "any
 permitting, among other things, 'disturbance', provided also that such
 findings shall be arranged and decided for the exclusive use of only
 one family." Defendant, who lived in a one family dwelling in
 District A, at 1408 Superior Street, Oak Park, was charged with vio-
 lating the ordinance by using another building at the rear of the
 premises as a three family dwelling.
 The entire zoning ordinance, passed in 1921, was placed in
 volume. Sub-paragraph 45, section 90.02, Article II defines a non-
 conforming building or use as one that does not conform with the
 regulations of the use district in which it is situated. Section 904,
 dealing with non-conforming uses, provides:
 "The law has been enacted at the time that this ordinance
 takes effect of a building or premises may be continued, although
 such use does not conform with the provisions hereof.
 Any building existing at the time this ordinance takes
 effect, whether or not, or at any time located in a non-con-
 forming use, may be continued or structurally altered, provided
 such structural alterations shall cost an amount not to exceed fifty
 per cent of the value of the building, and provided also that the

building shall not be enlarged unless the use thereof is changed to a conforming use.

"A non-conforming use may be changed to a use that is permitted ** The use of a building or premises shall not be deemed to have changed because of a temporary vacancy or change of ownership or tenancy, however, the suspension of a non-conforming use shall not be resumed after a period of conforming use."

The present complaint was filed some time after plaintiff had granted a permit to defendant for alterations to the rear building and after the work was completed. It was contended by plaintiff that at the time the zoning ordinance was passed in 1921, the rear building was used for the occupancy of but a single family, whereas defendant, after the alterations, was unlawfully using it as a three family dwelling.

Defendant contends the rear building was non-conforming when the ordinance was passed; that it was then and ever since occupied by more than one family; that the village acknowledged the building to be non-conforming, as, when application for alteration to the building was made by defendant, shortly after she purchased it in August, 1938, the permit was issued for an alteration to a non-conforming residence, not to exceed 50 per cent of the value, and the village through its inspectors knew of this during the alterations and approved of them almost a year before the complaint was filed.

We are of the opinion defendant has failed to support her position with any convincing evidence that the rear building was, at the time the ordinance was passed and ever since, occupied by more than one family. On the other hand, plaintiff's evidence supports its contention of a single family occupancy at the time the ordinance was passed and ever since, until the permit for alterations was granted.

The only testimony for defendant in support of her contention that the rear building was occupied by two families at the time the zoning ordinance was enacted in 1921, was that of a Mr. Deal. He testified that he had lived in the neighborhood and had been acquainted with the premises about 25 years - back to 1916 or 1917; that he knew

Building shall not be enlarged unless the use thereof is changed to a
residential use.

"A non-conforming use may be changed to a use that is per-
mitted by the use of a building or structure shall not be limited to
have changed because of a temporary vacancy or change of ownership or
tenancy, however, the extension of a non-conforming use shall not be
permitted after a period of continuous use."

The present complaint was filed some time after Plaintiff
had granted a permit to defendant for alterations to the rear building
and after the work was completed. It was contended by Plaintiff that
at the time the zoning ordinance was passed in 1961, the rear building
was used for the occupancy of but a single family, whereas defendant,
after the alterations, was unlawfully using it as a three family
dwelling.

Defendant contends the rear building was non-conforming when
the ordinance was passed; that it was then and ever since occupied by
more than one family; that the village authorized the building to
be non-conforming, as, when application for alteration to the building
was made by defendant, shortly after the ordinance it is argued, 1961,
the permit was issued for an alteration to a non-conforming residence,
not to exceed 50 per cent of the value, and the village through its
inspectors knew of this during the alterations and approved of them
almost a year before the complaint was filed.

As one of the parties defendant has failed to support her
contention with any convincing evidence, and the rear building was at
the time the ordinance was passed and ever since, occupied by more than
one family. On the other hand, Plaintiff's evidence supports its
contention of a single family occupancy at the time the ordinance was
passed and ever since, until the permit for alteration was granted.
The only testimony the defendant in support of her conten-
tion that the rear building was occupied by two families at the time
the zoning ordinance was enacted in 1961, was that of a Mr. Paul. He
testified that he had lived in the neighborhood and had been acquainted
with the premises about 25 years - back to 1915 or 1916; that he knew

the occupancy of the building on the rear end of the lot during all those years; that he delivered groceries for several firms and made deliveries to people in that building. Counsel for defendant then asked, not with respect to any particular time, if he knew the names of the people who lived there, "the two families who lived in the building?" To which he replied, "No, I did not, no, no, I don't remember the names." This was the only question pertaining to a "two family" occupancy asked of this witness, although he said he was acquainted with the occupancy of the building during all those years.

When the building alterations were being made in 1938, he was employed by the contractor who did the work for defendant; he did not know whether at that time one or two families lived there. Although this witness testified he lived in the neighborhood, he did not give an address or his period of residence there.

Defendant testified that at the time she bought the premises in August, 1938, there were two families living in the rear building, one upstairs and one downstairs, and that shortly afterward the people downstairs moved; that at the time this complaint was filed "there were three individual units living there then."

Ruth Rankin, a real estate agent, testified for defendant that over a period of four months before she sold the property to defendant the building was occupied by two families.

Charles Van Kirk, who has lived in the house west of the defendant's property since 1924, testified for plaintiff that one person occupied the rear house for several years, followed by a married couple - afterward another married couple.

Mrs. Vasey, whose daughter in 1938, was looking for an apartment, testified for plaintiff that in this building there was just one room upstairs, over a two car garage.

Defendant testified that when she purchased the premises she began to clean, repair and fix up the premises and went to the Village Hall and got the permit for alteration; that she had a con-

the occupancy of the building on the year end of the 1st during all those years; that he delivered possession for several times and made deliveries to people in that building. I cannot for the moment then asked, not with respect to any particular time, if he knew the names of the people who lived there, "the two families who lived in the building?" To which he replied, "No, I did not, no, no, I don't remember the names." This was the only question pertaining to a "two family" occupancy asked of this witness, although he said he was acquainted with the occupancy of the building during all those years. When the building alterations were being made in 1936, he was employed by the contractor who did the work for defendant; he did not know whether at that time one or two families lived there, although this witness testified he lived in the neighborhood, he did not give an address or his period of residence there.

Defendant testified that at the time she bought the premises in August, 1930, there were two families living in the premises, one upstairs and one downstairs, and that shortly afterwards the people (residents moved) and at the time this witness was living there were three individual units living there then."

John Larkin, a real estate agent, testified for defendant that over a period of four months before she sold the property to defendant the building was occupied by two families.

Charles Van Kirk, who has lived in the house west of the defendant's property since 1934, testified for plaintiff that one person occupied the rear house for several years, followed by a married couple - a Raymond and another married couple.

Mrs. Vasey, whose daughter in 1936, was looking for an apartment, testified for plaintiff that in this building there was just one room upstairs, over a two car garage.

Defendant testified that when she purchased the premises she began to clean, repair and fix up the premises and went to the Village Hall and got the license for alterations; that she had a son-

versation with Mr. Walls, the building commissioner, who told her the permit was issued for a building that was put to a non-conforming use, but he did not say anything about the use of the premises by one family only, or how many families might occupy it. The alteration called for five or six electrical fixtures and outlets in each room, five plumbing fixtures, a gas hot water heating system with six radiators, and a rear stairway to the second floor.

Mr. Walls, testified that defendant came to his office and asked what was delaying the alteration permit; he explained there was some question as to the use she intended for the property; that his inspectors had told him she wanted to make a studio on the second floor west; it appeared to him from the application for plumbing fixtures on the second floor, where there were existing plumbing fixtures for the family that was living there, that there was going to be more than one family using the premises, and if that was the intention it would be a violation of the zoning ordinances. He said defendant informed him that she had no intention of violating the ordinance; she wanted to make a studio out of the second floor west in order to carry on her work in music, and also to provide better facilities for the family occupying the place at the east. The commissioner, after hearing defendant's explanation of the use she intended for the property, saw no objection to issuing the permit, which was dated October 25, 1938.

Mr. Wilcox, a plumbing inspector, had several conversations with defendant, and in one of these, after the permit was issued, she said she thought of finishing off the interior of the second floor west into a room she might use as a studio, and asked if that would be allowed, and was told by him that if she was going to use it herself it would be all right to use it as a studio only; that he later went to her house and asked if she was finishing off this quarter on the west as an apartment and she said she was not. He explained that

conversation with Mr. Wells, the building commissioner, who said that the permit was issued for a building that was not to a non-conforming use, but he did not say anything about the use of the premises by any family only, or how many families might occupy it. The alteration called for five or six electrical fixtures and outlets in each room, this electrical equipment, a gas and water heating system with air registers, and a rear delivery to the second floor.

Mr. Wells, testified that defendant came to his office and asked what was delaying the alteration permit; he explained there was some question as to the use and intended for the property; that his inspector had told him that he wanted to make a studio on the second floor west; it appeared to him from the application for plumbing fixtures on the second floor, where there were existing plumbing fixtures for the family that was living there, that there was going to be more than one family using the premises, and if that was the intention it would be a violation of the zoning ordinance. He said defendant informed him that she had no intention of violating the ordinance; she wanted to make a studio out of the second floor west in order to carry on her work in music, and also to provide better facilities for the family occupying the place at the east. The commissioner, after hearing defendant's explanation of the use and intended for the property, saw no objection to issuing the permit, which was dated October 25, 1936.

Mr. Alcock, a plumbing inspector, had several conversations with defendant, and in one of these, after the permit was issued, she said she thought of finishing off the remainder of the second floor west into a room she might use as a studio, and asked if that would be allowed, and was told by him that it was going to need its own self it would be all right to use it as a studio only; that he later went to her house and asked if she was finishing off this quarter on the west as an apartment and she said she was not. He explained that

it would be a violation to allow anybody else to live in the building. She then said that when she bought the building the realtor said she would be allowed to finish off some rooms and rent them as living quarters in the rear, and she figured on that at the time she bought the house and did not know how she was going to make payments for the house or make ends meet unless she did.

Mr. Guinlan, an electrical inspector, examined the premises several days after the application for the permit was made, at which time one tenant lived on the east side of the second floor and the rest of the building was unoccupied - the ground floor was fitted for but not at that time used as a garage. He later made numerous inspections, the last in October, 1939, when the first floor east was used as a boiler room and for storage space, the second floor east used by the same tenant as before, and the upstairs and downstairs on the west occupied by two separate tenants.

Mr. Bartels, the building inspector, examined the rear premises in June, 1939; through the center of the building leading from the first floor to the second was a stairway inside the building; it then housed three separate families, with the east lower floor used for storage. Defendant at that time told him she had the same parties living there as were there previous to the time when she bought the property, but since then had made two additional rooms. The witness next inspected the premises in September, 1939, and told defendant that in the opinion of the village she was violating the ordinance, and unless she restored the building to its original status as being occupied by only one family, the village would prosecute.

There is nothing in the testimony of defendant or of the building commissioner, Walls, or of any other witness, nor in the actions of any of the inspectors, to indicate that plaintiff, through its agents, acknowledged the building as non-conforming for more than a single family occupancy and approved of the alterations for any different use.

it would be a violation to allow anybody else to live in the building. The man said that when the building was rented the tenant said the would be allowed to live in the building and that he was going to live in the building in the rear, and the license on that at the time the building was rented and did not know how the man was going to make payments for the house or what else under the law.

Mr. [Name], an electrical inspector, examined the premises several days after the application for the permit was made, at which time one tenant lived on the east side of the second floor and the rest of the building was unoccupied - the ground floor was listed for but not at that time used as a garage. He later made another inspection, the last in October, 1937, when the first floor east was used as a boiler room and for storage room, the second floor east was used by the same tenant as before, and the west side and basement was used for storage by the [Name] family.

Mr. [Name], the building inspector, examined the premises in June, 1938; through the center of the building leading from the first floor to the second was a stairway inside the building; it then housed three separate families, with the east lower floor used for storage. Defendant at that time told him she had the same parties living there as were living there in the time when she bought the

property, but since then had made two additional rooms. The witness next inspected the premises in September, 1938, and told defendant that in the opinion of the village she was violating the ordinance, and that the west side of the building was in original state as before. Defendant by only one family, the village would prosecute.

There is nothing in the testimony of defendant or of the building commissioner, walls, or of any other witness, nor in the actions of any of the inspectors, to indicate that plaintiff, through the [Name] family, intended the building as non-conforming for more than a while (only) and approved of the situation for any

It is argued that the inspectors of the village supervised the repair work as it was done under the permit in question and must have known of defendant's intentions with respect to the alterations by reason of the quantity of supplies ordered and, in effect, defendant therefore should be relieved upon the theory of an estoppel.

No reference is made to any evidence whereby it could be said that the inspectors were given any reason to believe the repairs and alterations were being made for the use of any more than one family in the building. Defendant assured the inspectors that she had no intention of violating the ordinance. This also was her reply at the time her permits were secured, when she was informed by the building commissioner that an extension of the single family use would be a violation of the zoning ordinance as it applied to the non-conforming building.

As we have already said, defendant has failed to support her position that the rear building was, at the time the ordinance was passed, and ever since, occupied by more than one family. It is not unreasonable to believe, according to the testimony of the plumbing inspector, Wilcox, that defendant unfortunately had relied upon the advice of the realtor at the time she purchased the premises, namely, that she would be permitted to finish off some rooms in the rear building and rent them as living quarters. It was not until some time afterward that she made application to the village authorities for a permit and was informed of the zoning regulations.

Defendant next complains the trial court should have allowed her to testify as to the character of other buildings in the same block and to show that certain alleged orders and directions would result in unfair discrimination to her without any corresponding benefit to the public, and cites Merrill v. City of Wheaton, 356 Ill. 457. That case was an injunction suit brought to restrain the city from interfering with the remodeling of a building intended to change it from a single family to a two family dwelling, and attacked the

It is argued that the inspectors of the village authorities
the report with it was sent under the pretext of inspection and that
have known of defendant's intentions with respect to the alterations
by reason of the quantity of supplies obtained and, in effect, defendant
not having been believed and the report of the inspectors.
No reference is made to any evidence showing it would be
said that the inspectors were given any reason to believe the repairs
and alterations were being made for the use of the army than one
family is the building. Defendant showed the inspectors that the
no intention of violating the ordinance. This also was not true as
the time for permits were secured, when the was informed by the
building commissioner that an extension of the family dwelling was would
be a violation of the zoning ordinance as it applied to the non-
residential building.
As we have already said, defendant not failed to support his
position that the rear building was, at the time the ordinance was
passed, and ever since, occupied by more than one family. It is not
unreasonable to believe, according to the testimony of the planning
inspector, Wilson, that defendant's statements had relied upon the
advice of the architect at the time the ordinance was passed, namely,
that the would be permitted to build off some rooms in the rear
building and rent them as living quarters. It was not until some time
afterwards that the made application to the village authorities for a
permit and was informed of the zoning regulations.
Defendant said he would not have been aware of the ordinance until
he so testify as to the character of other buildings in the same
block and to show that certain alleged orders and alterations would
result in unfair discrimination to him without any corresponding
treatment to the family, and also that the building was not
45V. That once was an information was brought to receive the city
from interfering with the remodeling of a building intended to change
it from a single family to a two family dwelling, and attached the

validity of section 3 of the zoning ordinance which forbade the erection in certain territory of any buildings except single family dwellings and boarding houses limited to sixteen boarders. The court held, under the circumstances of that case, that section 3 of the ordinance was discriminatory and unreasonable in prohibiting a two family residence but permitting boarding or rooming houses with a large number of persons. This case is not in point, as it involved the validity of an ordinance. In the instant case defendant has not questioned the validity of any part of the zoning ordinance; here involved was the enforcement of an ordinance, not its validity, and the exclusion of evidence as to other buildings was proper.

Defendant's principal claim to error is that the trial court disregarded what she believed to be the preponderance of the evidence. We hold that the violation of the ordinance by defendant in the respect referred to, and as charged in plaintiff's complaint, was proved by a clear preponderance of the evidence, as is required in cases of this kind. City of Chicago v. Harrett Bfg. Co., 102 Ill. App. (abst.) 460; City of Chicago v. Howe, 187 Ill. App. (abst.) 175, and cases there cited.

Moreover, defendant claimed as part of her defense that the rear building was, at the time the ordinance was passed and ever since, occupied by more than one family. She asked the court to base a finding thereon in her favor. She then had the burden of furnishing the evidence upon which such a finding could legally rest. Prentice v. Crane, 234 Ill. 302, 309. "Where defendant pleads an affirmative defense he has the burden of maintaining such defense by a preponderance of the evidence." MacNeil, Illinois Evidence, (2d ed.) 474, and cases there cited. Defendant failed to maintain her defense in this respect.

The judgment of the Criminal court of Cook county is affirmed.

JUDGMENT AFFIRMED.

O'Connor, P.J., and Hatchett, J., concur.

41302

STELLA STRASSBERG and M. LEWIS,
Appellees,

v.

LAMBORN, HUTCHINGS & CO., A. C.
THOMP and C. W. THOMP, Co-
partners,

Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

307 I.A. 546

MR. JUSTICE MCGURELY DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought suit alleging that defendants, who were brokers on the Chicago Board of Trade, failed to notify plaintiff M. Lewis of a change in the market price of corn as defendants had promised to do; that by reason of this plaintiffs suffered a loss which they sought to recover from defendants. Upon trial by the court judgment was entered against defendants for \$799.40, from which they appeal.

Plaintiff Lewis had had dealings with defendants through Henry White, their customer's man, and subsequently introduced Mrs. Stella Strassberg, the other plaintiff, to White; she desired to open a trading account but was told by White that the rules of his firm did not permit trading accounts with women, so it was agreed that Mrs. Strassberg would make her investments through Lewis, and all of the transactions were between Lewis and White.

Plaintiffs assert that White promised to notify Lewis if there was any change in the market of "1/8 of a cent, more or less," and that August 2, 1937, there was a fluctuation in the corn market of 4 and 1/8 cents a bushel; that defendants did not notify plaintiffs of this, with the resulting loss. White denies making such a promise.

In the fall of 1935, Lewis was solicited by White to transfer his stock account to defendant Lamborn, Hutchings & Co., and Lewis signed a card whereby he agreed to be bound by all the rules and regulations of the Chicago Board of Trade. One of these rules forbade brokers to give continuous market quotations over telephone wires.

1100

CHAS. STEINBERG & CO. INC.
1100 N. W. 10th St.,
Tulsa, Oklahoma

307 I.A. 546

appears.

NO. 110000 NO. 110000 NO. 110000 NO. 110000

Plaintiff's account with defendant was closed, and was

transferred to the Chicago Board of Trade, called to testify Plaintiff's

level of a change in the market price of corn as defendant had

promised to do; that by reason of this plaintiff suffered a loss which

that court is to recover from defendant. That court is to recover from

plaintiff was entered against defendant for \$100,000, less which they

appeal.

Plaintiff's level had been closed with defendant through

Henry Jones, bank manager's son, and subsequently transferred to

Wells Fargo, the other plaintiff, to which she desired to open

a trading account but was told by wife that the rules of the firm did

not permit trading accounts with women, so it was agreed that she

transferred would have her investments through Jones, but all of the

transactions were between Jones and wife.

Plaintiff's account that wife promised to testify level of

there was no change in the market of "1/2 of a cent, more or less."

and that August 2, 1937, there was a fluctuation in the corn market of

4 and 1/2 cents a bushel; that defendant did not testify plaintiff of

this, with the resulting loss. Wife would testify that a promise.

In the fall of 1938, level was solicited by wife to trans-

fer the stock account to defendant's husband, Henry Jones, Jr., and level

agreed to sell whereby he agreed to be bound by all the rules and

regulations of the Chicago Board of Trade. One of these rules forbade

trading in live cattle and other livestock with defendant's firm.

There is in the record an account of the various transactions of Lewis in the grain market through Lamborn, Hutchings & Co. Commencing in April, 1937, there were six of such transactions, all of which showed a profit to Lewis. During all of these transactions White kept Lewis informed as to the market conditions. In August, 1937, Lewis instructed White to sell 20,000 bushels of September corn and to buy an equal amount of December corn. This is called a "spread" on the Board of Trade. August 2, the corn market fluctuated, and White instructed his telephone operator to call Lewis at about 11:15 o'clock in the morning, but the operator reported that she could not get a call through; that she would receive the busy signal; eventually she reached Lewis' office and was told by his operator that he was out; word was left for Lewis to call White, but White heard nothing from Lewis' office all that day.

All of the corn trades made by Lewis were on margin and Lewis had stocks pledged with defendants to secure the grain orders. On the morning of August 3, White called Lewis to tell him he must put up more collateral, since the "spread" had moved against him. Lewis declined to put up more collateral and his stocks were sold to cover the loss.

Defendants argue effectively that it was unreasonable to believe White promised to notify Lewis of every 1/8 of a cent price change. Records were introduced showing that on August 3 there were about 350 separate 1/8 of a cent price fluctuations in September corn and about 250 price fluctuations in December corn. In order to inform Lewis of every change of 1/8 of a cent on this date it would have required White to notify Lewis approximately 550 times. Moreover, there is no claim that White, in the prior transactions with Lewis, notified him of changes of 1/8 of a cent in the market price. There are various other considerations which negative any undertaking by White to notify Lewis of any change of 1/8 of a cent in the market.

There is in the record an account of the various transactions of Lewis in the grain market through January, February & March, 1937, there were six or seven transactions, all of which showed a profit to Lewis. During all of these transactions White kept Lewis informed as to the market conditions. In August, 1937, Lewis instructed White to sell 25,000 bushels of soybeans corn and to buy an equal amount of December corn. This is called a "spread" in the world of trade. Lewis & White entered into this and White instructed his telephone operator to call Lewis at about 11:15 o'clock in the morning. But the operator reported that she could not get a call through; that she would receive the busy signal. Eventually she reached Lewis' office and was told by his operator that he was out; that was left for Lewis to call White, but White heard nothing from Lewis' office all that day.

All of the corn trades made by Lewis were on margin and Lewis had various dealings with defendants in respect to their orders. On the morning of August 5, White called Lewis to tell him he must put up more collateral, since the "spread" had moved against him. Lewis declined to put up more collateral and his checks were sold to cover the loss.

Defendants argue effectively that it was unnecessary to believe White promised to notify Lewis of every 1/8 of a cent price change, because White instructed Lewis that at least a 1/4 cent was about 200 separate 1/8 of a cent price fluctuations in September corn and about 250 price fluctuations in December corn. In order to follow Lewis of every change of 1/8 of a cent on this date it would have required him to notify Lewis approximately 250 times. However, White is no claim that White, in the price transactions with Lewis, notified him of changes of 1/8 of a cent in the market price. There are various other considerations which negative any suggestion by White to notify Lewis of not changes of 1/8 of a cent in the market.

In plaintiffs' brief they admit that White did not promise to notify Lewis of any change of $1/8$ of a cent in price, but say he promised to notify Lewis of "any changes $1/8$ of a cent, more or less," and the argument is made that the words "more or less" meant a promise to notify Lewis of the fluctuations of more than one-eighth. In their statement of claim plaintiffs asserted that defendants agreed to notify them "as often as the market fluctuated at least $1/8$ of one cent," so long as the "spread" was in excess of 25 points. The trial court based its finding upon the conclusion that defendants did not give notice that the fluctuation was exceeding $1/8$ of one cent. The judgment entered of \$799.40 was the amount of plaintiffs' loss, less $1/8$ of a cent per bushel, and this can only be explained upon the theory that Lewis should have been notified as soon as the "spread" price had fallen off $1/8$ of a cent.

There is also force in defendants' argument that while the evidence shows White endeavored, unsuccessfully, to reach Lewis by telephone when the price had changed substantially, the court disregarded this testimony because it was of the opinion White should have called Lewis the moment of a $1/8$ of a cent fluctuation. In other words, the court adopted the theory of plaintiffs that White had promised to notify Lewis the moment there was any change of $1/8$ of one cent. As we have indicated, we hold this theory is unreasonable and cannot be given credit.

Plaintiffs make some argument that the transaction was a gambling transaction, and say that under the Municipal court practice no pleadings are necessary in fourth class cases in the Municipal court. Municipal court rule 3, par. 1 (1933), requires plaintiff to file a statement of claim setting forth the facts of his complaint. There is no claim made in the instant statement of claim that this was a gambling transaction. The judgment was not entered upon this theory.

We are of the opinion the record does not justify the judgment entered and it is reversed.

JUDGMENT REVERSED.

O'Connor, P.J., and Hatchett, J., concur.

In Plaintiff's brief they admit that this was a promise to notify Lewis of any change of 1/8 of a cent in price, but they do not admit to notify Lewis of "any change of 1/8 of a cent, more or less," and the argument is made that the words "more or less" meant a promise to notify Lewis of the fluctuation of more than one-half cent. In their statement of claim Plaintiff asserted that Defendant agreed to notify them "as often as the market fluctuated as little 1/8 of one cent," no less as the "quoted" was in excess of 25 points. The trial court based its finding upon the conclusion that Defendant did not give notice that the fluctuation was exceeding 1/8 of one cent. The judgment entered at 1936-40 was the amount of Plaintiff's loss, less 1/8 of a cent per bushel, and this can only be explained upon the theory that Lewis should have been notified as soon as the "quoted" price had fallen off 1/8 of a cent.

There is also force in Defendant's argument that while the evidence shows that Defendant unnecessarily to prove Lewis by telephone that the price had dropped substantially, the court should have granted this testimony because it was of the opinion that Lewis should have called Lewis the amount of a 1/8 of a cent fluctuation. In other words, the court adopted the theory of Plaintiff that this was promised to notify Lewis the moment there was any change of 1/8 of one cent. As we have indicated, we hold that this theory is unreasonable and cannot be given effect.

Plaintiff's sole issue argued that the transaction was a gambling transaction, and any time under the Michigan court practice no proceedings are necessary in such cases as the Michigan court. Michigan court rule 3, part 1 (1935), requires Plaintiff to file a statement of claim setting forth the facts of his complaint. There is no claim made in the instant statement of claim that this was a gambling transaction. The judgment was not entered upon this theory. We are of the opinion the record does not justify the judgment entered and it is reversed.

CESIRA CALZAVARA, FRANK CALZAVARA,
her husband, and MENDO CALZAVARA,
Appellants,

v.

HENRY A. BEANBERRY, WALTER J.
CURMING, and GEORGE I. WRIGHT,
Trustees of the Chicago, Milwaukee,
St. Paul and Pacific Railroad
Company, a Corporation,
Appellees.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

307 I.A. 547

MR. JUSTICE McSHURELY DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought suit claiming separate damages sustained by them by the burning of a frame barn and its contents, alleging the fire was caused by the negligence of defendants in allowing dry grass and weeds to be upon the right of way of the railroad operated by them as trustees, which was set on fire from a locomotive engine, and also in failing to keep their locomotive engine and trains in suitable order and repair so that fire would not escape and be thrown upon the right of way and property of adjoining land owners; that at 1:30 o'clock in the afternoon of October 11, 1932, sparks from a locomotive engine passing upon the railroad set fire to the grass and weeds on the right of way, which fire spread and was communicated to the barn of plaintiff Cesira Calzavara, whereby it with its contents was wholly consumed.

The case was tried before a court and jury, and at the conclusion of the evidence for plaintiffs the court peremptorily instructed the jury to return a verdict of not guilty. Judgment was entered and plaintiffs appeal.

It is well established that the trial court may not direct a finding for the defendant when there is evidence which fairly tends to support the plaintiff's case. If the evidence supporting the plaintiff is sufficient to make a prima facie case the court is not authorized to direct a verdict for defendant because of evidence of contrary facts tending toward an opposite conclusion. Shannon v. Nightingale, 321, Ill. 168, 175.

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...and ...
...and ...
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DEPT. OF THE ARMY, WASHINGTON, D. C.

bioactive chemical groups which form hydrogen bonds.

There was caused by the negligence of defendant in allowing the

and, as a result, the Commission has been able to identify the individuals who are most likely to be involved in the activities of the Commission.

also in failing to keep their locomotive engine and train in constant motion and to have some few slowest and fastest and regular and irregular

05:1 to 06:1 hours, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2

[illegible]

... ..

...the most was tried between a court and jury and as the jury

new material. It is not a matter of time or money, but of the quality of the material. The quality of the material is the most important factor in the success of the project. The quality of the material is the most important factor in the success of the project.

It is well established that the trial court may not direct a finding for the defendant when there is evidence which fairly tends to establish the contrary.

See also James and Mary Anne's letter to John at Washington at Washington

1. General ; 2. Specific ; 3. Conclusion ; 4. Summary ; 5. References ; 6. Appendix ; 7. Index ; 8. Glossary ; 9. Notes ; 10. Footnotes ; 11. Endnotes ; 12. References ; 13. Appendix ; 14. Index ; 15. Glossary ; 16. Notes ; 17. Footnotes ; 18. Endnotes ; 19. References ; 20. Appendix ; 21. Index ; 22. Glossary ; 23. Notes ; 24. Footnotes ; 25. Endnotes ; 26. References ; 27. Appendix ; 28. Index ; 29. Glossary ; 30. Notes ; 31. Footnotes ; 32. Endnotes ; 33. References ; 34. Appendix ; 35. Index ; 36. Glossary ; 37. Notes ; 38. Footnotes ; 39. Endnotes ; 40. References ; 41. Appendix ; 42. Index ; 43. Glossary ; 44. Notes ; 45. Footnotes ; 46. Endnotes ; 47. References ; 48. Appendix ; 49. Index ; 50. Glossary ; 51. Notes ; 52. Footnotes ; 53. Endnotes ; 54. References ; 55. Appendix ; 56. Index ; 57. Glossary ; 58. Notes ; 59. Footnotes ; 60. Endnotes ; 61. References ; 62. Appendix ; 63. Index ; 64. Glossary ; 65. Notes ; 66. Footnotes ; 67. Endnotes ; 68. References ; 69. Appendix ; 70. Index ; 71. Glossary ; 72. Notes ; 73. Footnotes ; 74. Endnotes ; 75. References ; 76. Appendix ; 77. Index ; 78. Glossary ; 79. Notes ; 80. Footnotes ; 81. Endnotes ; 82. References ; 83. Appendix ; 84. Index ; 85. Glossary ; 86. Notes ; 87. Footnotes ; 88. Endnotes ; 89. References ; 90. Appendix ; 91. Index ; 92. Glossary ; 93. Notes ; 94. Footnotes ; 95. Endnotes ; 96. References ; 97. Appendix ; 98. Index ; 99. Glossary ; 100. Notes ; 101. Footnotes ; 102. Endnotes ; 103. References ; 104. Appendix ; 105. Index ; 106. Glossary ; 107. Notes ; 108. Footnotes ; 109. Endnotes ; 110. References ; 111. Appendix ; 112. Index ; 113. Glossary ; 114. Notes ; 115. Footnotes ; 116. Endnotes ; 117. References ; 118. Appendix ; 119. Index ; 120. Glossary ; 121. Notes ; 122. Footnotes ; 123. Endnotes ; 124. References ; 125. Appendix ; 126. Index ; 127. Glossary ; 128. Notes ; 129. Footnotes ; 130. Endnotes ; 131. References ; 132. Appendix ; 133. Index ; 134. Glossary ; 135. Notes ; 136. Footnotes ; 137. Endnotes ; 138. References ; 139. Appendix ; 140. Index ; 141. Glossary ; 142. Notes ; 143. Footnotes ; 144. Endnotes ; 145. References ; 146. Appendix ; 147. Index ; 148. Glossary ; 149. Notes ; 150. Footnotes ; 151. Endnotes ; 152. References ; 153. Appendix ; 154. Index ; 155. Glossary ; 156. Notes ; 157. Footnotes ; 158. Endnotes ; 159. References ; 160. Appendix ; 161. Index ; 162. Glossary ; 163. Notes ; 164. Footnotes ; 165. Endnotes ; 166. References ; 167. Appendix ; 168. Index ; 169. Glossary ; 170. Notes ; 171. Footnotes ; 172. Endnotes ; 173. References ; 174. Appendix ; 175. Index ; 176. Glossary ; 177. Notes ; 178. Footnotes ; 179. Endnotes ; 180. References ; 181. Appendix ; 182. Index ; 183. Glossary ; 184. Notes ; 185. Footnotes ; 186. Endnotes ; 187. References ; 188. Appendix ; 189. Index ; 190. Glossary ; 191. Notes ; 192. Footnotes ; 193. Endnotes ; 194. References ; 195. Appendix ; 196. Index ; 197. Glossary ; 198. Notes ; 199. Footnotes ; 200. Endnotes ; 201. References ; 202. Appendix ; 203. Index ; 204. Glossary ; 205. Notes ; 206. Footnotes ; 207. Endnotes ; 208. References ; 209. Appendix ; 210. Index ; 211. Glossary ; 212. Notes ; 213. Footnotes ; 214. Endnotes ; 215. References ; 216. Appendix ; 217. Index ; 218. Glossary ; 219. Notes ; 220. Footnotes ; 221. Endnotes ; 222. References ; 223. Appendix ; 224. Index ; 225. Glossary ; 226. Notes ; 227. Footnotes ; 228. Endnotes ; 229. References ; 230. Appendix ; 231. Index ; 232. Glossary ; 233. Notes ; 234. Footnotes ; 235. Endnotes ; 236. References ; 237. Appendix ; 238. Index ; 239. Glossary ; 240. Notes ; 241. Footnotes ; 242. Endnotes ; 243. References ; 244. Appendix ; 245. Index ; 246. Glossary ; 247. Notes ; 248. Footnotes ; 249. Endnotes ; 250. References ; 251. Appendix ; 252. Index ; 253. Glossary ; 254. Notes ; 255. Footnotes ; 256. Endnotes ; 257. References ; 258. Appendix ; 259. Index ; 260. Glossary ; 261. Notes ; 262. Footnotes ; 263. Endnotes ; 264. References ; 265. Appendix ; 266. Index ; 267. Glossary ; 268. Notes ; 269. Footnotes ; 270. Endnotes ; 271. References ; 272. Appendix ; 273. Index ; 274. Glossary ; 275. Notes ; 276. Footnotes ; 277. Endnotes ; 278. References ; 279. Appendix ; 280. Index ; 281. Glossary ; 282. Notes ; 283. Footnotes ; 284. Endnotes ; 285. References ; 286. Appendix ; 287. Index ; 288. Glossary ; 289. Notes ; 290. Footnotes ; 291. Endnotes ; 292. References ; 293. Appendix ; 294. Index ; 295. Glossary ; 296. Notes ; 297. Footnotes ; 298. Endnotes ; 299. References ; 300. Appendix ; 301. Index ; 302. Glossary ; 303. Notes ; 304. Footnotes ; 305. Endnotes ; 306. References ; 307. Appendix ; 308. Index ; 309. Glossary ; 310. Notes

The evidence showed that the railroad tracks at the place in question ran in a westerly direction on a down slope; the fence on the northerly side of the right of way was two or three feet south of the south side of the barn; dead grass and dry weeds from 1 to 1-1/2 feet high covered the slope of the northerly embankment of the right of way and they had been there through the summer. The day was clear and dry and the wind was from the south.

Mina Calzavara, the daughter of plaintiffs, was working in the kitchen of the dwelling nearby. She testified that she saw through the west kitchen window a locomotive going west along the railroad, drawing two coaches, passing the barn and emitting sparks; that a few minutes later she went outside and saw the southwest side of the barn burning; that she called the fire department of the village of Libertyville, Ill. but before it arrived the barn and its contents were entirely burned; that she could see the grass and weeds starting to burn along the back of the barn on their property; that the sparks coming from the engine were as large as one's finger nail - "little red sparks flying from the south." The weather bureau report for that day was offered in evidence, showing that the maximum temperature was 83°, with an average of 72°; the maximum wind velocity 16 miles, with a momentary velocity of 24 miles - the prevailing direction from the south, and the sunshine 99 per cent.

Chapter 114, par. 54, Ill. Rev. Stats. 1939, provides it shall be the duty of railroads to keep their right of way clear "from all dead grass, dry weeds, or other dangerous combustible material, and for neglect shall be liable" in damages. Paragraph 96 provides that in all actions against a railroad for the recovery of damages to property "occasioned by fire communicated by any locomotive engine while upon or passing along any railroad in this state, the fact that such fire was so communicated shall be taken as full prima facie evidence to charge with negligence" a corporation or persons who shall be in the use or occupation of the railroad.

The evidence shows that the railroad tracks at the place in question are in a westerly direction on a level slope; the fence on the northern side of the right of way was two or three feet south of the south side of the track; good grass and hay grows from 1 to 1 1/2 feet high covering the slope of the northernly extension of the right of way and they had been there through the summer. The soil was clear and dry and the wind was from the south.

Miss Galt, the daughter of the witness, was walking in the kitchen of the dwelling nearby. She testified that she saw through the west kitchen window a locomotive going west along the railroad, drawing two coaches, passing the barn and building opposite; that a few minutes later she went outside and saw the southeast side of the barn burning; that she called the fire department of the village of Libertyville, Ill. but before it arrived the barn and its contents were entirely burned; that she could see the ground and would testify to the fact that the fire was not caused by the locomotive but by the sparks flying from the south. The weather bureau report for that day was offered in evidence, showing that the maximum temperature was 85°, with an average of 75°; the maximum wind velocity 35 miles, with a momentary velocity of 45 miles - the prevailing direction from the south, and the humidity 85 per cent.

On May 11, 1901, the Illinois Central Railroad Company shall be the duty of railroads to keep their right of way clear from all dead grass, dry weeds, or other dangerous combustible material, and for neglect shall be liable in damages. Paragraph 90 provides that in all actions against a railroad for the recovery of damages for property destroyed by fire communicated by any locomotive engine while upon or passing along any railroad in this state, the fact that such fire was so communicated shall be taken as prima facie evidence of negligence and shall be a presumption of negligence. The railroad shall be liable for the cost of the railroad.

Some remarks made by the trial court indicate that he was doubtful as to some parts of the testimony of Miss Calzavara, but it was not for the court, upon the motion to direct the verdict, to weigh the evidence.

Under the statute it is only necessary for the plaintiff, to establish a *prima facie* case of negligence against the railroad company to introduce evidence tending to show that the fire was caused by sparks from the engine. E. C. C. & St. L. Ry. Co. v. Bernsby, 232 Ill. 138. In E. C. R. Co. v. Bailey, 232 Ill. 480, the evidence showed that from 10 to 30 minutes after a train had passed, fire was seen coming from the roof of a building nearby and the building was burned. The court held this evidence fairly tended to prove the fire was communicated to the building from defendant's engine and it was sufficient to make out a *prima facie* case, and the court therefore would not have been justified in directing a verdict for the defendant.

We are of the opinion that plaintiffs' evidence fairly tended to prove the fire was communicated to plaintiffs' barn from defendants' engine, and this was sufficient to make out a *prima facie* case under the statute. The trial court was not justified in instructing the jury to find against plaintiffs.

The judgment is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

O'Connor, P.J., and Watchett, J., concur.

LA SALLE MORTGAGE & DISCOUNT COMPANY,
a Corporation,

Appellee,

v.

ALBERT J. HURAN, Bailiff, et al.

THE TURNER TYPE FOUNDRY COMPANY, a
Corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

807 I.A. 547²

MR. JUSTICE MACHENET DELIVERED THE OPINION OF THE COURT.

January 9, 1936, the Turner company, defendant in this case, secured a judgment by confession for \$2250.75, in the Municipal Court of Chicago, against William Schwartz, doing business at 653 S. Wells street under the name of Midwest Printers Machinery works. On the same day an execution issued to the bailiff and was levied on property at the above premises. Later the bailiff levied the execution on other machinery and equipment at 320 W. 35th street. In each instance the LaSalle Mortgage & Discount Company gave notice of the trial of right of property. The cases were tried together by the court. In each case, on January 27, 1936, the court entered judgment on a finding in favor of the LaSalle company and the Turner company appealed to this court. The records will be best understood if considered separately.

William Schwartz, the judgment debtor, was engaged in the business of buying and selling secondhand printer's machinery. He owned a business at 653 S. Wells street and also at 320 W. Wells street. William Schwartz has a brother named Morris, who up to June 2, 1936, had not been engaged in any business on his own account. If and on he worked for his brother William. Sometimes he worked for the Turner company as a repair mechanic. He was paid from 40 cents to 50 cents an hour.

William Schwartz testified that about June 1, 1936, he (William) was offered a proposition to go into the watch business. He



THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
DOES hereby certify that the following is a true and correct copy of the original as the same appears in the records of the court.

IN RE: THE ESTATE OF WILLIAM SCHWARTZ, DECEASED.
JANUARY 1, 1935. The United States District Court for the District of Columbia, sitting in open court at the City of Washington, D.C., has heard the testimony of the witnesses in the above entitled case, and has rendered its verdict in favor of the plaintiff, and has entered its judgment accordingly.

IT IS ORDERED that the plaintiff recover of the defendant the sum of \$100,000.00, with interest thereon at the rate of six per cent per annum from the date of the death of the decedent until the date of the judgment, and the costs of the suit.

WILLIAM SCHWARTZ, the plaintiff, was engaged in the business of selling and installing electrical equipment, and owned a business at 633 E. 12th Street and also at 630 E. 12th Street. WILLIAM SCHWARTZ has a brother named MORRIS, who up to June 1, 1935, had been engaged in the business on his own account. MORRIS had worked for his brother WILLIAM. MORRIS had worked for the plaintiff company as a repair mechanic. He was paid from 50 cents to 75 cents an hour.

WILLIAM SCHWARTZ testified that about June 1, 1935, he was offered a proposition to go into the retail business, and he and MORRIS decided to do so. They organized the WILLIAM SCHWARTZ COMPANY, and WILLIAM SCHWARTZ was elected president and MORRIS was elected vice president. They began business on June 1, 1935, and the first business was the sale of electrical equipment. WILLIAM SCHWARTZ testified that he and MORRIS had a very successful business, and that they were both very wealthy men. WILLIAM SCHWARTZ testified that he and MORRIS had a very close relationship, and that they were both very honest and trustworthy men. WILLIAM SCHWARTZ testified that he and MORRIS had a very successful business, and that they were both very wealthy men.

did not know whether he wanted it or not, so he suggested his brother Morris "take a crack at it." He sold Morris "equipment to fit the nature of the business." He laid out for Morris the plans for the match company and the equipment he would need. Morris had never had any experience with that type of business. William prepared a conditional sales contract by which he sold to Morris for \$3500 certain equipment at 653 E. Wells street. The instrument acknowledged the receipt by William Schwartz of \$980 on the date of it (which was June 2, 1938) and the promise of Morris to pay to William the balance of \$2550 ten days thereafter. June 14, Morris, as the Midwest Match Company, executed a note for \$3000 to the order of plaintiff, LaSalle company, and by chattel mortgage conveyed the property which he had purchased from his brother to it as security. The note provided for the payment of \$160 on that date, \$160 upon the 14th day of each and every month thereafter for ten months, and the payment of \$1240 on June 14, 1939, all with interest at 6%. William Schwartz, the judgment debtor, guaranteed the payment of this note.

Morris Schwartz, testifying as a witness for defendant, said his brother William owed him \$480 and that he (Morris) paid to William in the transaction \$500 in cash; that he then arranged with the LaSalle company for a loan. His brother took him to the loan company where he got a check for \$2550, with which he paid off his brother for this property. Thereafter, he occupied the premises with his brother William. Morris says he was in the match business for about two months. He says he rented from his brother William at \$25 per month. There was a front door and a back door to the premises. The entrance to the business conducted by William as the Midwest Printers Machinery Works was by the front door, while the entrance to the business of his brother Morris, doing business as the Midwest Match Company, was by the back door. Morris says he sold very little in his business. He

did not know whether he wanted it or not, as he suggested his brother
Mortie "take a look at it." He said Mortie "agreed to let the
nature of the business." He said that Mortie then asked for the
makeup company and the equipment he would need. Mortie had never had
any experience with that type of business. William suggested a con-
ditional sales contract by which he could be sold to Mortie for a certain
equipment at 325 E. 12th Street. The instrument contemplated the
receipt by William forwards of 1930 on the date of 12th Street was
June 2, 1930, and the promise of Mortie to pay to William the balance
of \$2500 ten days thereafter. June 12, 1930, as the witness stated
Company, executed a note for \$2500 to the order of himself, Laddie
Company, and by check the mortgage conveyed the property which he had
purchased from his brother as it was security. He was required for
the payment of \$100 on that date, \$100 upon the 15th day of each and
every month thereafter for ten months, and the payment of \$1500 on
June 14, 1931, and also interest at 6% on the balance due. The witness
stated, guaranteed the payment of this note.
Mortie Roberts, testifying as a witness for defendant, said
his brother William owed him \$250 and that he (Mortie) said to William
in the transaction \$250 in cash; that he was satisfied with the
Laddie company for a loan. His brother took him to the loan company
where he got a check for \$250, which he said all his brother for
this money. He executed the check to the order of his brother
William. Mortie says he was in the same business for about two
months. He says he worked from his brother William at the pay master.
There was a front door and a back door to the premises. The entrance
to the business conducted by William at the address witness mentioned
was by the front door, while the entrance to the business of his
brother Mortie, doing business as the Midwest Radio Company, was by
the back door. Mortie says he sold very little in his business. He

remembers one customer who paid him \$20. He mailed out some catalogues. He says his brother William agreed to help him. "I didn't have to pay him. My duties were inside. I didn't go out." Morris says he might have done some little jobs of repairing while he operated the match business. He didn't sign the lease at 330 E. Wells street. His brother signed that. He made only one payment of \$160 and interest to the LaBalle company, in July, 1938, and did not pay anything after that. He never had a bank account in connection with his business. The machinery sold there was sold by his brother. December 27, 1938, Morris turned the property purchased from his brother over to the LaBalle company. This was about thirteen days before the entry of judgment and levy against William Schwartz. Morris Schwartz executed a bill of sale in consideration of his release from the chattel mortgage. On the same day the LaBalle company made a written contract with William Schwartz by which it employed him as its agent for "reasonable compensation for the services rendered by him in connection with the consummation of such sales, and not otherwise." The agreement provided that William Schwartz was to hold any proceeds of sales as trustee for the company. The agreement was to continue in effect until the company should elect to terminate the same on five days' notice. It provided William Schwartz should permit the LaBalle company to keep and store the property upon the premises known as 663 E. Wells street, Chicago, rent free, for the purpose of exhibiting the same to prospective buyers. At the same time an employee of plaintiff LaBalle company went over to 663 E. Wells street and with a stencil put on each piece of machinery a statement to the effect that it was owned by the LaBalle Mortgage & Discount Company. Between June 14, 1938, and December 27, 1938, William Schwartz sold various items of property listed on plaintiff's mortgage with the knowledge and consent of plaintiff, and \$1800 was received on these sales, turned over to plaintiff, and applied on the mortgage indebtedness. In addition

...and one of them who paid him \$100. He said that some other people
 He says his brother William agreed to help him. "I didn't have to pay
 him. My father was inside. I didn't pay anything. My father was the one
 have done some little jobs of repairing walls he needed the water
 business. He didn't sign the lease of the house. He signed the
 property signed with. He made only one payment of \$100 and interest
 to the Laffie company, in July, 1935, and did not pay anything after
 that. He never had a bank account in connection with the business.
 The machinery was sold by his brother, December 17, 1935.
 would have purchased the property purchased from his brother over to the
 Laffie company. This was about thirteen days before the entry of
 judgment and just against William Laffie. My father's company
 a bill of sale in consideration of his release from the contract
 mortgage. On the same day the Laffie company made a written contract
 with William Laffie by which it employed him as its agent for
 "exclusive representation for the services rendered by him in connection
 with the transaction of such sales, and not otherwise." The agree-
 ment provided that William Laffie was to hold any proceeds of sales
 as trustee for the company. The agreement was so worded as to allow
 until the company should elect to repurchase the same on five days.
 notice. It provided William Laffie should receive the Laffie
 company to hold and show the property upon the proceeds shown as \$100
 to William Laffie, Chicago, went to the purpose of exhibiting the
 name to prospective buyers. At the same time an employee of Laffie
 Laffie company went over to 600 E. Erie Street and with a tenant
 put on each place of machinery a statement to the effect that it was
 owned by the Laffie company a Diamond Company. Between June 11,
 1935, and December 17, 1935, William Laffie sold various items of
 property listed on plaintiff's mortgage with the knowledge and con-
 sent of plaintiff, and also was received on these sales, turned over
 to plaintiff, and applied on the mortgage indebtedness. In addition

a cash payment of \$160 and interest was made to plaintiff by Morris as already stated, in July, 1938.

Defendant contends the transactions between Morris Schwartz, William Schwartz and plaintiff relative to this Wells street property were fraudulent and void as to the creditors of William Schwartz. It says William Schwartz owned substantially all of the equipment listed in plaintiff's mortgage for a year or two prior to June 2, 1938, and on that date it represented practically all of his stock in trade; that Morris Schwartz was a repairman who had never had any experience in the match business nor steady employment, and that the instrument executed by these brothers was a conditional sales agreement payable in ten days; that a substantial part of the equipment contained in this sales agreement was of such nature that it could not possibly have been used in the alleged match business; that it was never moved from the premises on which it was located, and that William Schwartz, who occupied the premises, continued to sell the equipment in the usual course of business; that the retention of possession and control of these goods by William Schwartz after he had apparently sold them was evidence of an intention on his part to defraud his creditors; that even the joint or concurrent possession with Morris Schwartz was presumptively fraudulent. To this point is cited Hueble v. Morris, 131 Ill. 587, 591.

It is apparent the theory of the Turner company was that Morris Schwartz in the transaction in question was a mere dummy for his brother William; that the LaSalle Mortgage & Discount Company knew this and contrived with William and Morris Schwartz to the end that the creditors of William Schwartz might be defrauded. Whether the evidence justified such an inference it is unnecessary to express any opinion for the reason that the trial as to this particular property was not conducted fairly in the respects we shall now point out.

a cash payment of \$100 and interest was paid to plaintiff by Morris as
 witness stated, in 1917, 1918,

defendant admits the following facts: That Morris and
 William Roberts and plaintiff relative to their joint property
 were transferred and void as to the ownership of William Roberts. It
 says William Roberts owned substantially all of the equipment listed
 in plaintiff's mortgage for a year or so prior to June 3, 1938, and
 on that date it represented practically all of his stock in trade; that
 Morris Roberts was a taxpayer and had never had any experience in the
 wool business nor sheep raising, and that the equipment consisted

by these brothers was a partnership sales agreement entered in the
 fact; that a substantial part of the equipment consisted in this sales
 agreement was of such nature that it could not possibly have been used
 in the alleged wool business; that it was never used from the
 premises on which it was located, and that William Roberts, who con-
 trolled the premises, continued to sell the equipment in the usual
 course of business; that the retention of possession and control of
 these goods by William Roberts after he had apparently sold them was
 evidence of an intention on his part to defraud his creditors; that
 even the fact of concurrent possession of the Morris Roberts was
 presumptively fraudulent. To this point is cited Morris v. Morris,

121 Ill. 207, 201.

It is apparent the theory of the Turner company was that
 Morris Roberts in the transaction in question was a mere dummy for
 his brother William; that the latter mortgage a piece of property from
 this and conveyed it to William and Morris Roberts to the end that
 the creditors of William Roberts might be defrauded. Whether the
 evidence furnished such an inference it is unnecessary to express any
 opinion for the reason that the trial as to this particular property
 was not conducted fairly in the respects we shall now point out.

In the first place, the rules of the Municipal court designed to meet a situation such as existed were disregarded. Rule 136a provided for an examination of any "party" or "person" before trial. Defendant filed a petition to that end and secured an order for such examination of William and Morris Schwartz, an order which was quite appropriate under the circumstances. The trial judge, without notice to defendant and upon his own motion, struck his signature from the order. This was quite prejudicial to the Turner Type Founders Company. Rule 246 (3) of the Municipal court provides that in trial of the right of property no written pleadings shall be required other than plaintiff's statement of claim, which in this case merely alleged plaintiff was the owner of the property. It is said that such examination was within the discretion of the trial judge. This may be true, but discretion should never be abused. The striking of this order was, we hold, an abuse of discretion. Defendants were entitled to this order.

Second, Rule 137 of the Municipal court provided in substance that the court at any time might order the production of any documents in the power or possession of any party relating to any matter in question in the action. Defendant gave notice to the opposite party to produce certain documents and plaintiff refused to produce the same. The court said they ought to agree on something because defendant would want to see the books. The attorney for plaintiff said he would not produce them. Attorney for defendant suggested there should be a contempt proceeding, or at least a continuance for which he made a motion. The court reserved its ruling, the judge stating that the only question in the trial was to show title. Attorney for defendant then pressed for a continuance and a bill of particulars, but the court said, "I don't see so much involved in this. All they have to prove is how they got title." Later in the trial defendant moved for an order on plaintiff to produce its books of account, and the court said, "Not yet." Attorney for defendant

In the first place, the value of the municipal court provided to meet a situation such as existed here is immaterial. While this provides for an examination of any "party" or "person" before trial, defendant filed a petition to trial and was answered in order for such examination of William and Bertie Schaefer, an order which was also appropriate under the circumstances. The trial judge, without notice to defendant and upon his own motion, issued his subpoena from the order. This was quite prejudicial to the former type subpoena company. Rule 246 (5) of the municipal court provides that in trial of the right of property no written pleadings shall be required other than plaintiff's statement of claim, which in this case merely alleged plaintiff was the owner of the property. It is said that some examination was within the discretion of the trial judge. This may be true, but discretion should never be abused. The granting of this order was, in fact, an abuse of discretion. Petitions were admitted in this order. Second, Rule 127 of the municipal court provided in substance that the court at any time might order the production of any documents in the power or possession of any party related to any matter in question in the action. Defendant gave notice to the opposite party to produce certain documents and plaintiff refused to produce the same. The court said that it was in error in admitting evidence defendant would want to see the books. The plaintiff's attorney said he would not produce them. Attorney for defendant suggested there should be a contempt proceeding, or at least a continuance for which he made a motion. The court reserved its ruling. The judge stating that the only question in the trial was to show title. Attorney for defendant then pressed for a continuance and a bill of particulars, but the court said, "I don't see as much involved in this. All they have to prove is how they got title." Later in the trial defendant moved for an order on plaintiff to produce its books at account, and the court said, "That's all right, the defendant

then said, "I don't mean this minute. I mean, before the trial is ended." The court said, "I don't know. I may, and I may not." Mr. Wiseman: "If it is a question of title his testimony must either go to prove title or it is immaterial." The Court: "The best proof of title is the checks which you buy the article with. The canceled check is the best proof." Mr. Wiseman: "We are entitled to see their books and see what the entries are." The Court: "If I think you need them, I will bring them in."

It is apparent the court was proceeding on a wrong theory. Manifestly, in a case such as is here disclosed, there could be no efficient cross-examination of witnesses in the absence of the books. The record shows that repeatedly upon cross-examination witnesses when pressed said the books would show the facts asked about.

In the next place, we think the court erred in restricting the scope of the cross-examination of witnesses. Morris and William Schwartz were obviously hostile witnesses in so far as defendant was concerned. The defense was based on a charge of fraudulent transfer of property in which they were directly concerned. In such a case, wide and full examination and cross-examination should have been permitted. 27 Corpus Juris, 1935, p. 804-806. Frequent remarks of the court when ruling on the evidence showed that the case was tried by the court on the theory that inquiry might not be made as to whether transactions by checks and written contracts were bona fide. The court said: "All they have to prove is how they got title." At another time, "The best proof of title is the checks which you buy the article with." Apparently, on this theory it was ruled that Morris Schwartz might not be asked the source from which he obtained money to pay his brother on June 2, 1938, for the equipment which they testified was bought from William Schwartz by Morris Schwartz at that time; also, that his financial condition and ability might not be inquired into at length; that he might not be asked about his arrange-

then said, "I don't want this money. I want, before the trial is ended." The court said, "I don't know. I say, and I say not." Mr. Kinsman: "It is a question of title his testimony must either be to prove title or it is immaterial." The court: "The best proof of title is the checks which you pay the article with. The checks which is the best proof." Mr. Kinsman: "We are entitled to see their books and see what the entries are." The court: "If I think you need them, I will bring them in."

It is apparent the court was proceeding on a wrong theory. Evidently, in a case such as is here disclosed, there could be no efficient cross-examination of witnesses in the absence of the books. The record shows that repeatedly upon cross-examination witnesses when pressed said the books would show the facts asked about.

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to pay his brother on June 2, 1913, for the equipment which they testified was bought from William Schwartz by Morris Schwartz at that time; also, that his financial condition and ability might not be inquired into at length; that he might not be asked about his average

ment with his brother as to the lease at 320 Wells street; that the uselessness of equipment bought from William for the caten business in which it was supposed to be used could not be shown; that the control of the Wells street property by William Schwartz after December 27, 1938, could not be inquired of upon the examination of Mr. Kleiman, plaintiff's manager with whom William Schwartz dealt.

When it became apparent that Morris Schwartz was a hostile witness the court denied defendant's motion to make him the court's witness and permit full cross-examination on the ground that the motion should have been made before the examination of the witness began.

A night session of court was held and defendant asked a continuance which was denied. It is apparent the trial judge was in a hurry to get through, and that he misapplied the rules applicable to the trial of causes in which the issues were of the kind involved here. For these reasons the judgment will be reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

O'Connor, P.J., and McSurely, J., concur.

most with his brother as he the issue of the will which was the
 possession of equipment brought from within for the same business

in which it was supposed to be made should not be shown; that the

control of the wills of the property by William Johnson's estate

December 27, 1928, could not be included in upon the examination of

Mr. Johnson, Plaintiff's manager with whom William Johnson's estate

when it became apparent that there was a hostile

witness the court should defendant's motion to make the court's

motion and court's will stay proceedings in the present case the

motion should have been made before the examination of the witness

page.

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hurry to get through, and that he misapplied the rules applicable to

the trial of causes in which the issues were of the kind involved

here. For these reasons the judgment will be reversed and the cause

remanded for another trial.

WYLLIE AND HARRISON.

Conner, T. J., and McGarity, J. A. concur.

40830

LA SALLE MORTGAGE & DISCOUNT COMPANY,
a Corporation,

Appellee,

v.

ALBERT J. HOGAN, Bailiff, et al.

THE TURNER TYPE FOUNDERS COMPANY, a
Corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

307 I.A. 548¹

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Defendants appeal from a judgment entered January 27, 1939, in favor of the LaSalle company in an action of trial of the right of property situated at 820 W. 35th street in Chicago.

The facts in brief are that the Turner company on January 9, 1939, obtained a judgment against William Schwartz, who conducted a business in secondhand printing machinery at 653 E. Wells street, Chicago, under the name of Midwest Printers Machinery Works. Execution issued on the judgment against Schwartz in favor of the Turner company and was levied first on the property at 653 E. Wells street. The LaSalle company claimed the property and gave notice of trial of its rights. The execution was then levied on the property claimed to belong to the judgment creditor at 820 W. 35th street. The LaSalle company claimed this property also. There was in each case judgment in favor of the LaSalle Mortgage & Discount Company and appeal by defendant to this court. The appeal from the judgment as to the property at 653 E. Wells street has been considered in an opinion filed this day in No. 40829. This appeal involves the property at 820 W. 35th street.

In this case the LaSalle company gave evidence tending to show that Mr. Selig of the Matherson-Selig Company owned a printing plant which was purchased by the LaSalle company on October 28, 1936, for \$11,336.86, and received from the vendor a bill of sale. On the

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the Court at Chicago, Illinois, this 1st day of January, 1928.

 JUDGE OF THE COURT

805 L. 348

Defendant appeals from a judgment entered January 27, 1928, in favor of the Laclede company in an action of title of the right of property situated at 220 N. 34th street in Chicago.

The facts in brief are that the Laclede company on January 9, 1928, obtained a judgment against William Johnson, who conducted a business in automobile parking facilities at 220 N. 34th street, Chicago, under the name of Midwest Parking Facility Corp. An execution issued on the judgment against Johnson in favor of the Laclede company and was levied first on the property at 220 N. 34th street. The Laclede company claimed the property and gave notice of sale of the rights. The execution was then levied on the property claimed to belong to the judgment creditor at 220 N. 34th street. The Laclede company claimed this property also. There was in each case judgment in favor of the Laclede company a Missouri company and appeal by defendant to this court. The appeal from the judgment as to the property at 220 N. 34th street has been considered in an opinion filed this day in No. 40302. This appeal involves the property at 220 N. 34th street.

In this case the Laclede company have evidence tending to show that Mr. Bell of the Nathanson-Laclede company owned a parking plant which was purchased by the Laclede company on October 25, 1926, and that the property at 220 N. 34th street was a part of the

same day the LaBalle company resold this property to the judgment debtor, William Schwartz, for \$10,585.21, executing and delivering to him a conditional sales agreement which provided that title was reserved in the LaBalle company pending payment of the purchase price which was payable November 28, 1938, with interest at 7%. William Schwartz sold some pieces of the property and in each case turned over the proceeds to the LaBalle company. He defaulted in the payment due November 28, whereupon the LaBalle company took possession of the property and put Eric Glantz, one of its employees, in possession as custodian. Glantz remained as custodian, both day and night, for three months. He was paid for his services by checks of the LaBalle company, which also paid for electric lights, telephone, etc. Glantz was acting as custodian for the LaBalle company at the time of levy and at the time of the trial.

When the LaBalle company first took possession, an auction sale was advertised in the name of the Midwest Printers Machinery Works. The sale was in charge of Mr. Winternitz, but the property was not sold. The custodian testified the judgment debtor, William Schwartz, came over at times to show customers the machinery; that sometimes he was there every day, sometimes twice a week; that he didn't take anything out of the building without permission from the LaBalle company. The witness did not know what sales were made by William Schwartz but knew that he (the witness) had permission many times from the LaBalle company to take machinery out. He could not remember how many times William Schwartz had been at the place nor remember the last time he saw him there. He did not remember whether a cutting machine was moved out on December 8, but he remembered cutting machines were taken out and sold. He didn't know whether Schwartz showed these machines. The Winternitz company was also selling machinery there.

Kleinman, general manager of the LaBalle company, testified that after the termination of the conditional sales contract he told

name of the Laclede company record this property to the judgment
Gordon, William Schenck, for \$12,000.00, execution and delivery to
his conditional sales agreement which provided that title was to
be served in the Laclede company pending payment of the purchase price
which was payable November 25, 1924, with interest at 5% until
Schenck sold some piece of the property and in each case turned over
the proceeds to the Laclede company. He delivered in the payment due
November 25, whenever the Laclede company took possession of the
property and put the title, one of its employees, in possession as
evidenced. Schenck remained an employee, both day and night, for
three months. He was paid for his services by checks of the Laclede
company, which also paid for electric light, telephone, etc. Schenck
was acting as an employee for the Laclede company at the time of Levy
and at the time of the trial.

When the Laclede company first took possession, an auction
sale was advertised in the name of the Midwest Printing Machinery
Company. The sale was in charge of Mr. Winterstein, but the property was
not sold. The auctioneer testified the payment \$12,000.00
Schenck, came over at times to show over to the machinery; that
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didn't take anything out of the building without permission from the
Laclede company. The witness did not know what sales were made by
William Schenck but knew that he (the witness) had permission many
times from the Laclede company to take machinery out. He could not
remember how many times William Schenck had been at the place nor
whether the time he saw him there. He did not remember whether
a cutting machine was moved out on December 2, but he remembered
cutting machines were taken out and sold. He didn't know whether
Schenck moved there or not. The witness company was also
selling machinery there.

Kleinman, General manager of the Laclede company, testified
that after the execution of the conditional sales agreement he sold

William Schwartz that if he had an opportunity to sell any of the machinery he (the witness) would make arrangements to sell him a piece, but he said he didn't think Schwartz sold any after November 23.

November 23, 1938, Schwartz paid to the LaBalle company the sum of \$486.60, taking its receipt, and on November 30, he paid \$73.40.

The Turner company argues that the transaction by which the LaBalle company took title to this property and sold it to William Schwartz was in effect a mortgage as security for the money advanced by the LaBalle company for the purchase of the equipment, and that not being recorded it was void as to creditors under §1 of the Illinois Revised Statutes, ch. 95. This contention can not be sustained on the undisputed facts. The sale from Selig to the LaBalle company did not constitute a chattel mortgage because there was no debt from plaintiff to Selig. Plaintiff paid Selig for the plant and received an absolute bill of sale. The transaction between William Schwartz, the judgment debtor, and the LaBalle company by which Schwartz became possessed of the property was a conditional sales agreement and not a mortgage. The transaction was in conformity with §20 of the Uniform Sales act (Ill. Rev. Stats. ch. 121a) and the title of the LaBalle company prior to the time when the price was to be paid was superior to that of creditors. Silverthorne v. Chapman, 289 Ill. App. 286; Horvitz v. Leibowitz, 274 Ill. App. 196. When the debt became due plaintiff took immediate and exclusive possession. In the absence of some conduct by which the LaBalle company would be precluded, as provided by §23 of the Uniform Sales act, its rights would be superior to those of any creditor who might levy. At the time of the levy and even up to the time of the trial the custodian of plaintiff was in possession of the goods. (See Smith-Ward Ill. Anno. Stats. ch. 121-1/2, §20, p. 499, and §23, p. 499.) Sharer-Gillett Co. v. Long, 218 Ill. 438, 149 N. E. 325; Nat'l Bank of the Republic of

William Schwartz said it is not an opportunity to sell out of the machinery he (the witness) would make arrangements to sell him a piece, but he said he didn't think Schwartz said any after November 23, November 23, 1936, Schwartz said to the Laclede company the sum of \$420.00, taking her receipt, and on November 23, he said \$72.40.

The Turner company agrees that the transaction by which the Laclede company took title to this property was said to be a sale. Schwartz was in effect a mortgage on property for the money advanced by the Laclede company for the purchase of the equipment, and that not being recorded it was void as to creditors under it of the Illinois Revised Statutes, ch. 20. This contention can not be sustained on the undisputed facts. The sale from the Laclede company did not constitute a chattel mortgage because there was no debt from plaintiff to defendant. Plaintiff said title for the plant and received an absolute bill of sale. The transaction between William Schwartz, the judgment debtor, and the Laclede company by which Schwartz became possessed of the property was a conditional sales agreement and not a mortgage. The transaction was in conformity with 200 of the Uniform Sales Act (Ill. Rev. Stat. ch. 121) and the title of the Laclede company prior to the time when the sale was to be made was superior to that of creditors. Alvord v. Thacker, 229 Ill. App. 228; Harvey v. Kellough, 274 Ill. App. 124. When the debt became due plaintiff took immediate and exclusive possession. In the absence of some conduct by which the Laclede company would be precluded, as provided by 200 of the Uniform Sales Act, its rights would be superior to those of any creditor who might levy. At the time of the levy and even up to the time of the trial the question of plaintiff was in possession of the goods. (See also Ill. Rev. Stat. ch. 121, sec. 200.) Harvey v. Kellough, 274 Ill. App. 124, and Ill. Rev. Stat. ch. 121, sec. 200.

Chicago v. Wells-Jackson Corp., 353 Ill. 356, 193 N. E. 215; and West Suburban Finance Company v. Graham, 285 Ill. App. 587, 3 N. E. 2d 172.

As will appear from the opinion filed in No. 40889, the manner in which this case was tried is subject to criticism, but in so far as the property at 920 W. 35th street is concerned the rights of plaintiff are so clear that these errors could not in any way affect the merits of this suit, in which it is believed substantial justice was attained.

JUDGMENT AFFIRMED.

O'Connor, P.J., and McSurely, J., concur.

Chicago v. Wells-Anderson Corp., 288 Ill. 2d, 1951, 1952, and 1953.
Superior Finance Company v. Chicago, 288 Ill. 2d, 1951, 1952, and 1953.

As will appear from the opinion filed in No. 100,000, the
money in which this case was tried is subject to taxation and is so
far as the property of the Chicago v. Wells-Anderson Corp. case is
concerned, and no other case that these courts could not do any other
the matter of this case, in which it is believed that the
was affirmed.

CHIEF JUSTICE.

Concurrence, 1, 2, and 3, and 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100.

41109

CITY NATIONAL BANK AND TRUST COMPANY
OF EVANSTON, a National Banking Corpo-
ration,

Appellee,

v.

HARRY F. PEARSONS, et al.

HARRY F. PEARSONS and KATHARINE F.
HADDEN,

Appellants.

APPEAL FROM

CIRCUIT COURT,
COOK COUNTY.

307 I.A. 548²

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Defendants appeal from an order entered December 11, 1939, in a creditor's suit directing that the proceeds of two purchase money mortgage notes held in escrow pending the suit, should be applied to the satisfaction of plaintiff's judgment. The cause was heard upon plaintiff's supplemental bill as amended, the answer of defendants and the reply of plaintiff upon the stipulation of the parties as to facts filed in the cause December 22, 1939, and evidence taken in open court. The facts are not in dispute. The recovery of the judgment, the return of the execution unsatisfied, etc., are admitted. The purchase money mortgage notes were proceeds from the sale of a part of certain lands in Cook county, which on June 18, 1928, were owned in fee simple by Henry A. Pearsons, the father of the judgment debtor. The title was registered under the Torrens law.

January 18, 1928, Henry A. Pearsons conveyed this land to the Commercial Trust and Savings Bank upon certain trusts declared in writing, of which the judgment debtor was beneficiary. August 4, 1931, by written direction of Henry A. Pearsons and Harry F. Pearsons, the bank by deed conveyed the land to defendant Katharine F. Hadden, she at the same time executing and delivering this writing: "I, Katharine F. Hadden, declare that I hold title to the following described parcels of land, conveyed to me this day by Commercial Trust and Savings Bank, as Trustee for the benefit of Harry F. Pearsons: etc." The

FILED
U.S. DISTRICT COURT
SOUTHERD DISTRICT OF NEW YORK
JAN 10 1938

MADEY V. TRUSTEES OF THE

MADEY V. TRUSTEES OF THE

307 I.A. 348

THE TRUSTEES OF THE

Defendants appeal from an order entered December 11, 1937, in a creditor's bill filed in the proceeds of two separate money mortgage notes held in several pending the bill, which is applied to the satisfaction of plaintiff's judgment. The order was based upon plaintiff's supplemental bill as amended, the report of defendants and the reply of plaintiff upon the allegations of the petition as to facts filed in the cases December 23, 1937, and evidence taken in open court. The facts are not in dispute. The recovery of the judgment, the return of the execution unsatisfied, etc., are admitted. The purchase money mortgage notes were proceeds from the sale of a part of certain lands in Cook county, which on June 18, 1936, were owned in fee simple by Henry A. Thompson, the father of the judgment debtor. The title was registered under the Torrens law January 18, 1938, Henry A. Thompson conveyed this land to the Commercial Trust and Savings Bank upon certain trusts declared in writing, of which the following is a copy: Henry A. Thompson, the by written direction of Henry A. Thompson and Harry P. Thompson, the bank by deed conveyed the land to defendant Katherine P. Madden, who at the same time executing and delivering this writing: "I, Katherine P. Madden, declare that I hold title to the following described parcel of land, conveyed to me this day by Commercial Trust and Savings Bank, as Trustee for the benefit of Henry P. Thompson: and The

writing describes the lands and is sworn to by Katharine F. Hadden before a notary public.

Plaintiff's judgment was for \$6,492.69. It was recovered August 13, 1938, in a suit on a note dated March 30, 1936. This suit was begun October 4, 1938, and notice of lis pendens filed in the office of the Registrar.

Attached to the stipulation of Facts filed in the court December 22, 1938, are exhibits which are copies of the instruments and conveyances above described. The stipulation of the parties consists of nineteen paragraphs. No. 16 is as follows: "That the purchase money mortgages deposited in escrow by Katharine F. Hadden be taken and held in substitution for the land therein described and subject to the same trusts, claims and liabilities as said land was held prior to its conveyance, and that the above entitled cause proceed against said mortgages and the proceeds thereof, with the same force and effect as the same might have been prosecuted against said land had title remained in Katharine F. Hadden as it was on the date of the filing of the above entitled cause. It is the intention of the parties that if the land described in the purchase money mortgages was or could be subject to the lien of the plaintiff's judgment against Harry F. Pearsons, or could be reached or subjected by Creditor's Complaint to the payment thereof, the purchase money mortgages might be reached, sold or applied to the satisfaction of said judgment." The 19th paragraph provides: "The stipulation shall be filed in the above entitled cause and the recitations, terms, conditions and agreements contained herein shall be considered as part of the pleadings of the parties hereto and be conclusive upon the parties."

Katharine F. Hadden is a cousin of Harry F. Pearsons, who during these transactions was and now is a practicing lawyer. The evidence shows that since she took the title she has held it merely for the convenience of the judgment debtor; that the judgment debtor

writing describing the same and in which it is stated that the same was

first a party to the same.

Plaintiff's judgment was for \$5,000.00. It was recovered

against it, but, as a result of a writ of habeas corpus, it was

and began October 4, 1938, and notice of said judgment was filed in the

file of the Registry.

Attached to the stipulation of facts filed in the court

December 22, 1938, are exhibits which are copies of the judgments

and conveyances above described. The stipulation of facts contains

state of Alabama mortgage. No. 10 is as follows: "That the

purchase money mortgage described in answer to question 1. When the

taken and held in substitution for the first mortgage described and sub-

ject to the same trust, claims and liabilities on said land are held

prior to its conveyance, and that the above entitled cases proceed

against said mortgage and the process thereof, and the same have

and effect as the same might have been prosecuted against said land and

title remained in Katherine V. Nathan as it was on the date of the

filing of the above entitled cases. It is the intention of the parties

that if the land described in the purchase money mortgage was or

could be subject to the lien of the Plaintiff's judgment against Harry

V. Nathan, so much as would be subject to judgment of Plaintiff

to the payment thereof, the purchase money mortgage might be released,

void or applied to the satisfaction of said judgment." The 10th

paragraph provided: "The stipulation shall be filed in the above en-

titled cases and the motions, venue, exceptions and amendments

contained herein shall be considered as part of the pleadings of the

parties hereto and be conclusive upon the parties."

Katherine V. Nathan is a cousin of Harry V. Nathan, who

during these transactions was and now is a practicing lawyer. The

has received the proceeds of sales; that she has acted entirely at his direction, and it seems on plain equitable principles plaintiff is entitled to the relief prayed unless some controlling rule of law forbids.

Defendants say these mortgages may not be applied to the judgment against Harry F. Fearsom because the writings by which the supposed trust in Katharine F. Madden was created show the lack of elements necessary to the creation of a trust. They say the title, therefore, vested in Katharine F. Madden in her own right and that she holds clear of the claims of creditors of the judgment debtor. To this point is cited Marble v. Marble, 304 Ill. 828-838; Saborn v. Bearick, 325 Ill. 829-837; Illinois, etc. v. Jones, 351 Ill. 498-506, and Gurnett v. Mutual, etc., 356 Ill. 612. These cases do not sustain the proposition to which they are cited. In all of them questions are considered with reference to the existence of active trusts. All these cases hold that to create such a trust requires a definite subject matter, a definite beneficiary and a definite statement as to the nature and quantity of interest of the beneficiary, and the manner in which the trust is to be performed. These must be set forth with certainty.

We hold the trust created in Katharine Madden by her declaration at the time she took title is sufficiently clear and definite in these respects. The land which is the subject matter of the trust is definitely described. The beneficiary is definitely named. The duties of the trustee are clear and certain, which is merely to hold the title for the beneficiary. We hold the trust is not lacking in any of these respects. Manifestly, however, the trust created is a dry as distinguished from an active trust. The distinction is clearly pointed out in Warrie v. Fargay, 307 Ill. 534, 538, which has been followed in numerous cases. In substance, a dry trust is one in which, as here, the trustee is a mere passive depository of

the property without active duties. The cases all hold such a trust is executed by the statute of Uses so that nothing remains for the trustee to do but convey the property upon the request of the beneficiary. The trust undertaken by Katharine F. Hadden, it will be remembered, states "I hold title *** as trustee for the benefit of Harry F. Pearsons ***." This was clearly a dry or passive trust, the effect of which was to vest title in the beneficiary not the trustee. Tyler v. Tyler, 25 Ill. App. 233; Holl v. Gardner, 214 Ill. 248, 234-35.

It is next argued this property cannot be taken under creditor's bill by reason of the exception stated in §48 of the Chancery act (Smith-Hurd Anno. Stats., ch. 22, p. 284). This section in substance provides that a judgment creditor may by this proceeding reach any property, money or thing in action, etc., due to the debtor "or held in trust for him," "*** except when such trust has, in good faith, been created by, or the fund so held in trust has proceeded from, some person other than the defendant himself." If we are correct in our conclusion that the trust created in Katharine F. Hadden was a dry or passive trust this contention also is without merit. Holl v. Gardner, 214 Ill. 248. If, however, we assume, as defendants by their amended answer aver and by evidence offered notwithstanding their stipulation to the contrary to show, that the effect of the conveyance to Katharine F. Hadden was to create an active trust of the same kind and nature as was brought into existence by the original deed from Henry F. Pearsons to the Commercial Trust and Savings Bank and the declaration of trust executed in connection therewith, we are nevertheless convinced by our examination of these instruments that the trust created thereby is not exempted by this exception stated in this section of the Chancery act.

These instruments placed the title in the bank but gave to the judgment debtor (Harry F. Pearsons) the earnings, avails and proceeds of the real estate. He was given practically exclusive power

to direct all deals with reference to the title, was given the power to manage and control the land and the title, the right to sell and to receive the proceeds of mortgages, of sales or other dispositions of the premises. It was provided the trustee bank might deal with the real estate or make deeds thereto only when authorized in writing by Harry P. Pearsons; that the trustee was not to be required to inquire into the propriety of directions given by Harry P. Pearsons. He was given the right of management, control, selling, renting and handling the property and was to receive the proceeds of any sales. Henry A. Pearson reserved the right to revoke the trust and to demand a reconveyance. He never did either. He is now dead. As a matter of fact, this provision never at any time in any wise limited the control or interest of Harry P. Pearsons in the premises. Defendants cite Blinn v. LaForge, 181 Ill. 598-607; Nequa v. Graham, 187 Ill. 67; Von Keeler v. Scully, 257 Ill. App. 496, and First National Bank v. Starkey, 130 Ill. App. 532.

The Von Keeler case involved a spendthrift trust. In the Nequa case it was held that the debtor under the circumstances took an annuity as a purchaser, and it was applied on his debt. In the Blinn case it was held that a trust fund created by the will of a third person, and held under the control of trustees directed to pay the income to the debtor, could not be reached by a creditor's bill to an amount necessary for the maintenance of the beneficiary and her children, who were dependent upon her for support. The case is practically distinguishable as involving a spendthrift trust. The Starkey case also involved a testamentary trust where the control and management was still in the hands of executors and trustees, and it was held the interest of the debtor could not be reached by creditor's bill prior to an order of distribution by reason of §49. All these cases are distinguishable.

Section 49 expressly gives the creditor power to compel the discovery and application of any property "held in trust for him,"

to direct all deals with reference to the title, and from the power to manage and control the land and the title, the right to sell and to receive the proceeds of mortgage, of sales or other dispositions of the premises. It was provided the trustee shall deal with the real estate or with deals thereto only when authorized in writing by Henry F. Peterson; that the trustee was not to be required to insure the property at insurance given by Henry F. Peterson, but was given the right of management, control, selling, renting and handling the property and was to receive the proceeds of any sales. Henry F. Peterson reserved the right to receive the trust and to receive a reconveyance. He never did either. He is now dead, as a matter of fact, this provision never at any time in any way limited the control or interest of Henry F. Peterson in the premises. Henry F. Peterson, 191 VII, 202-203, 197 VII, 201
The Estate of Henry F. Peterson, 191 VII, 202-203, 197 VII, 201
Trust, 191 VII, 202.

The trust case involved a spendthrift trust. In the trust case it was held that the debtor under the circumstances took an immunity as a purchaser, and it was applied on his debt. In the trust case it was held that a trust fund created by the will of a third person, and held under the control of trustees directed to pay the income to the debtor, could not be reached by a creditor's bill to an amount necessary for the maintenance of the beneficiary and her children, who were dependent upon her for support. The case is trust case also involved a testamentary trust where the control and management was still in the hands of trustees and executor, and it was held the interest of the debtor could not be reached by creditor's bill prior to an order of distribution by reason of §40. All these cases are distinguishable.

Section 40 expressly gives the creditor power to reach the recovery and application of any property "held in trust for him."

that is, the judgment debtor. This section was copied from a similar New York statute. Illinois courts in construing it follow the construction which up to the time of its enactment here had been put upon it by the New York courts. Adams v. Graham, 107 Ill. 67. The New York courts have held that property, the title to which is held for the debtor in a dry or passive trust, may be taken for his debts. Verdin v. Bloom, 71 N. Y. 348; Willet v. Thompson, 5 Paige (N.Y.) 683; Ullman v. Cameron, 106 N. Y. 339, 346; Wells v. Ely, 11 N. J. Eq. 173. We hold the exception of the statute not applicable to trust property which has passed into the control and management of the debtor.

Defendants next contend the trust in Katharine F. Hadden was a spendthrift trust and is not subject to be taken for debts of the beneficiary for that reason. They cite Keller v. Keller, 224 Ill. App. 198; Holloway v. Prudential, etc., 222 Ill. App. 324, and Wallace v. Foxwell, 220 Ill. 616, 627, and similar cases. Keller v. Keller perhaps goes further than any other Illinois case in extending the application of the doctrine of the spendthrift trust, which was approved by the Supreme court in the case of Weid v. Whitehead, 111 Ill. 247, and has been followed ever since. Neither that case nor any other in this state, so far as we are informed, holds that a spendthrift trust will be created unless manifestly it was the clear intention of the creator of the trust to bring such a trust into existence. The evidence here is not sufficient to disclose any such intention.

It is pointed out the beneficiary was the son of the donor and a man of mature years, and evidence was introduced to the effect that at the time the premises were conveyed to the bank by his father the beneficiary was estranged from his wife. She later instituted divorce proceedings. The case reached this court and is reported in Pearsons v. Pearsons, 222 Ill. App. 92. The beneficiary was a lawyer. The instrument by which Henry A. Pearsons conveyed the property was apparently carefully prepared. If it had been the intention to create a spendthrift trust it is apparent it would have been so declared.

Defendants complain the court erred in its rulings on the admissibility of evidence. Upon objection by plaintiff, evidence offered by defendants was excluded as to alleged conversations between Harry F. Pearsons and Katherine F. Hadden at the time of the execution of the deed to Miss Hadden. These conversations tended to contradict the writing which was a part of the stipulation and to show that she took the title with the understanding it was to be held on the same trusts imposed upon the bank from which she received the deed. Defendants made an offer of proof on this point to which objection was sustained. On their objection, also, evidence was excluded of a written declaration of trust executed by Katherine F. Hadden at the request of Harry F. Pearsons long after the stipulation in this case was filed, and which tended to contradict the facts as recited in the stipulation. The evidence was clearly an afterthought inconsistent with the facts as stipulated and was properly excluded.

Defendants point out the conveyance to the bank provided that the proceeds of the trust should be considered as personalty and not realty, and we are reminded that the statute of Uses is not applicable to personalty. We are not unmindful of this provision in the original conveyance to the bank nor of the law applicable. The provision was applicable, however, to the proceeds of the trust rather than the subject matter of the trust itself. The written request of Henry A. and Harry F. Pearsons to the bank to convey to Katherine F. Hadden, we think, waived this provision in so far as they are concerned. However, in view of the actual provisions of that declaration of trust, as we have already pointed out, and in view of the absolute control over this property which the debtor has at all times possessed and now possesses, we hold it is subject to be taken for his debts under either the general rules of chancery or the specific provisions of §49 of the Chancery act. The statute does not exempt from its application property from whatever source which has actually passed into possession of the debtor and is being used by him for his own purposes.

Defendants complain the court tried in the trial in the
admissibility of evidence. Upon objection by defendant, evidence
offered by defendant was excluded as to alleged conversation between
Henry F. Thompson and Katherine V. Hudson at the time of the execution
of the deed to said land. These conversations tended to contradict
the writing which was a part of the stipulation and to show that the
fact the title with the understanding it was to be held as the same
trusts imposed upon the bank from which the money was loaned. De-
fendants make an offer of proof on this point to which objection was
sustained. On their objection, also, evidence was excluded of a
written declaration of trust executed by Katherine V. Hudson at the
request of Henry F. Thompson long after the stipulation in this case
was filed, and which tended to contradict the facts as recited in the
stipulation. The evidence was clearly an irrelevant immaterial
with the facts as stipulated and was properly excluded.
Defendant point out the conveyance to the bank provided
that the proceeds of the trust should be conveyed as personally and
not realty, and we are reminded that the estate of real is not ap-
licable to personally. We are not unaware of this provision in the
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Henry A. and Henry F. Thompson to the bank to convey to Katherine V.
Hudson, we think, waived this provision in as far as they are con-
cerned. However, in view of the actual provisions of that declaration
of trust, as we have already pointed out, and in view of the amount
advanced over this property which the bank has at all times possessed
and now possesses, we hold it is subject to be taken for his debts
under either the general rules of summary or the specific provisions
of 449 of the University act. The estate does not exempt from its ap-
plication property from whatever source which has actually passed into
possession of the bank and is being used by him for his own purposes.

we hold this property was liable for the debts of Harry S. Parsons, the judgment debtor.

The decree will be affirmed.

DECREE AFFIRMED.

O'Connor, F.J., and McSurely, J., concur.

is held this property was stolen for the purpose of being sold, therefore,
the judgment is correct.

The answer will be affirmed.

Answer returned.

Witness, J. J. and J. J., sworn.

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.
LEVI BILLO,
Plaintiff in Error.

CIT OF HONOR TO
MUNICIPAL COURT
OF CHICAGO.

307 I.A. 549

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was arrested without a warrant and July 6, 1939, arraigned on an information which charged that on the 1st day of July, 1939, he "did then and there unlawfully, knowingly and willfully cause, aid and encourage Marvin Dupont Wilson then and there being a male child under the age of 17 years to be or to become a delinquent child, and did knowingly and willfully do acts which directly tended to render such child a delinquent child," in violation of par. 104, ch. 38 of the Illinois Statutes, 1937. The information was signed by Bessie Wilson and purports to have been subscribed and sworn to by her. The record shows that leave to file the information was given; that defendant was present in open court; that the court took jurisdiction of defendant's person and ordered the bailiff to take him into custody; that defendant was arraigned and advised by the court of his right to trial by jury; that he pleaded not guilty, waiving trial by jury and submitted his cause to trial by the court; that after hearing the testimony and arguments of counsel, the court found defendant guilty in manner and form as alleged in the information of contributing to the delinquency of a child; that judgment was entered to that effect and defendant sentenced to serve in the House of Correction for one year.

The evidence taken upon the trial is not preserved by bill of exceptions or report of proceedings. The judgment was entered July 6, 1939. February 9, 1940, defendant made a motion to expunge the judgment of July 6, 1939, vacate it, quash the writs and discharge the defendant. The grounds of the motion were stated to be that the information failed to charge a criminal offense as required by Art. 2, § 9 of the Illinois Constitution; that the information was void because

RECEIVED BY THE
CLERK OF THE COURT
IN THE
CITY OF CHICAGO
JULY 1936

3047 L.A. 543

Defendant in error was convicted without a verdict and July 8, 1936, assigned as an information which charged that on the 1st day of July, 1936, he "did then and there unlawfully, knowingly and wilfully cause, aid and abet, encourage, harbor, assist, conceal and bring a male child under the age of 17 years to be or to become a delinquent child, and did knowingly and wilfully do acts which directly tended to render such child a delinquent child," in violation of par. 104, ch. 38 of the Illinois Statutes, 1931. The information was signed by George Wilson and purports to have been subscribed and sworn to by him. The record shows that leave to file the information was given; that defendant was present in open court; that the court took jurisdiction of defendant's person and ordered the writ of habeas corpus issued; that defendant was arraigned and advised by the court of his right to trial by jury; that he pleaded not guilty, waiving trial by jury and submitted his cause to trial by the court; that after hearing the testimony and arguments of counsel, the court found defendant guilty as charged and gave as alleged in the information of contributing to the delinquency of a child; that judgment was entered to that effect and defendant sentenced to serve in the house of correction for one year.

The evidence taken upon the trial is not preserved by bill of exceptions or report of proceedings. The judgment was entered July 8, 1936. Defendant made a motion to expunge the judgment of July 8, 1936, recited it, quash the mittimus and discharge the defendant. The grounds of the motion were stated to be that the information failed to charge a criminal offense as required by par. 1,

the verification to it purports to have been acknowledged in the year "19," which was 1980 years before the alleged offense was committed; that the mittimus or warrant of commitment was void and was issued in violation of Art. 2, §2 of the Constitution of Illinois and the Fourteenth Amendment to the Constitution of the United States; that defendant was not represented by counsel and the court was without jurisdiction to try the cause for that reason, and that the trial was held in violation of Art. 2, §2 of the Constitution of Illinois; that defendant had a meritorious defense which he was prevented from presenting without fault or negligence on his part by reason of excusable mistake and ignorance.

The People by the State's Attorney answered and later made a motion to strike defendant's motion which was granted and the motion denied. Defendant then sued out this writ of error.

It is urged for reversal that while the information charges the crime to have been committed July 1, 1939, the information appears to have been verified in the year 19. Defendant cites People v. Weinstein, 265 Ill. 830, and other cases. In People v. McCullough, 305 Ill. App. 269, this court held that where a defendant went to trial without objecting to defects in the verification of the information such defects were waived.

It is urged that the information fails to charge a crime because it fails to set out what particular acts, if any, defendant committed. People v. Ellis, 185 Ill. App. 417, and similar cases are relied on. The information here was in the language of the statute, and this was held to be sufficient in People v. Wallace, 185 Ill. App. 214. A similar ruling was made by this court in People v. Baker, (Opinion abstracted) 305 Ill. App. 500.

Other points made by plaintiff in error are based upon the assumption that the information was fatally defective which, as we have seen, was not the case. It is, therefore, unnecessary to give further consideration to such points. The judgment will be affirmed.

JUDGMENT AFFIRMED.

O'Connor, F.J., and McSurely, J., concur.

THE VERIFICATION OF THE INFORMATION IS THE RESPONSIBILITY OF THE USER.

and I would like to see the Commission be invited to continue to work

10-10-68

CONFIDENTIAL - SECURITY INFORMATION

Approved for Release by NSA on 08-25-2013 pursuant to E.O. 13526

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© 2000 Blackwell Science Ltd, *Journal of Internal Medicine* 247: 395–402

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The results of the study's statistical analysis are shown in Table 1.

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Approved for Release by NSA on 08-25-2013 pursuant to E.O. 13526

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It is urged that the information be held in confidence

because it fails to put out what is necessary, it may, however,

THE ABOVE TABLES ARE, VIA THE AIR MAIL, BEING SENT TO THE FOLLOWING:

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

Journal of Management Studies, 19(6), 701-718.

[illegible]

Other points made by witnesses in court are found in the

congregation that the information was fatally defective which, as we

[illegible]

Other conditions to be observed. The judgment will be affirmed.

41286

EUGENIA CYKLIŃSKI,

v.

S. CHAPNICKI,

Appellee,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

307 I.A. 550¹

In an action for personal injuries caused, as alleged, by defendant's negligence and upon trial by jury there was a verdict for plaintiff with damages assessed at \$750, on which the court overruling motions of defendant for a new trial entered judgment, and defendant appeals. It is contended that the court erred in overruling a motion of defendant for a directed verdict at the close of all the evidence; that the verdict is against the manifest weight of the evidence, and that the motion of defendant for a new trial, or, in the alternative, for judgment notwithstanding the verdict, should have been allowed.

Plaintiff was injured November 19, 1938, in a collision between two automobiles in Roscoe street near the intersection of that street with Pulaski road (also known as Crawford avenue), in the City of Chicago. Plaintiff, a married lady, lived with her husband, who was a painter, and their family at 3411 N. Harding avenue, less than a block from the scene of the accident. Plaintiff and her husband had been shopping at the store of Sears, Roebuck & Company located on Irving Park boulevard and Milwaukee avenue. They started home, he driving a 1938 Chevrolet automobile. Plaintiff sat in the front seat with her husband. Their little boy about two and one-half years of age was in the back seat.

Pulaski road has street car tracks in it. On the day in question it was dry and in good condition. It runs north and south while Roscoe street runs east, intersecting and ending at Pulaski road. Plaintiff's husband testified he was driving south on Pulaski road and turned east into Roscoe street; that when he was in about the

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REPORT OF THE BOARD OF DIRECTORS AND CHIEF FINANCIAL OFFICER

1053 .A.1 703

for judgment notwithstanding the verdict, should have been allowed.
that the motion of defendant for a new trial, or, in the alternative,
that the verdict is against the weight of the evidence, and
of defendant for a directed verdict at the close of all the evidence;
appeals. It is contended that the court erred in overruling a motion
motions of defendant for a new trial entered judgment, and defendant

Plaintiff was injured November 17, 1936, in a collision between two automobiles in Kansas Street near the intersection of Main Street with Walnut Street (also known as Broadway Avenue), in the City of Chicago. Plaintiff, a married lady, lived with her husband, who was a painter, and their family at 3411 W. Harding Avenue, East Town a block from the scene of the accident. Plaintiff and her husband had been shopping at the store of Sears, Roebuck & Company located on Irving Park Boulevard and Illinois Avenue. They entered Sears, in October 1936 Chevrolet automobile. Plaintiff was in the front seat with her husband. Their 1936 car struck two men and fell from the curb in the East End.

turned
and was into Moscow street; that when he was in about the
level, KILPATICK's husband, standing on the flying walk on KILPATICK
Street, turned about and saw, (recognizing and seeing as KILPATICK
question it was dry and in good condition. It runs north and south
KILPATICK street has turned out smooth in it. On the day in

middle of the street he for the first time observed automobiles coming west in Noeoe street and saw one coming toward him. He says the front end of his automobile was straight with the east curb line of Pulaski road; that he was facing east and defendant's automobile was about 20 feet east of him coming west. He blew the horn. Plaintiff said to him, "Look out. Those fellows are not looking where they are going." Mr. Gwiklinski says he then made a dead stop with his car facing a little southeast and the south end was then about 3 or 4 feet east of the east curb of Pulaski road. Mr. Gwiklinski blew his horn again, and the other auto struck him. He says the front bumper struck close to the fender of the car, lifted up the running board, smashed the left fender and pushed the automobile in which plaintiff was riding about one or one-half of a foot. His wife, he says, bounced against him, then struck the right hand side of the car. Mr. Gwiklinski told her to get out and helped her to do so. He says there were two boys in the car that hit them. These boys had a radio and he heard it going full blast. He called the police station and the police came and took the boys to the station. They were near their home, where plaintiff went. She was at the time in the eighth month of pregnancy.

Pulaski road is about 40 feet wide. Plaintiff's husband says he drove into the intersection at a speed of about 3 miles per hour. Cars were parked on Pulaski road, to some extent obscuring vision. Noeoe street is about 20 or 25 feet wide. There was an apartment building on the northeast corner of the intersection. Mr. Gwiklinski said to defendant, "Why don't you look where you are going?" to which defendant replied, "He could expect anybody coming from this way." Plaintiff's husband says there was traffic going north in Pulaski at the intersection. Plaintiff testified in detail, corroborating for the most part the testimony of her husband as to the way the collision occurred.

Defendant, twenty-three years of age, says he was driving a 1938 Plymouth four-door sedan, two months old; that he took his car out of gear and left it in neutral because cars were parked on Pulaski road and that when he got there he applied the brakes slowly. He had been looking to the left to see if there was any moving traffic because he was going to turn north into Pulaski road. In the meantime there was a crash. He says he was moving about a half mile an hour. Three or four cars had gone through so he slowed down fearing he could not go through because it was a busy corner. Defendant says that after plaintiff got out of the car she walked up to them and said, "You young brats should not be driving a car." He told her he was not a young brat. He asked plaintiff if the little boy was injured. He says there was a radio in the car; that it was Saturday and a great ball game was on. Leon Kyskowski was in the car with him. Defendant says when about 12 feet from the curb line of Pulaski road he glanced to the right and then immediately to the left.

Defendant's companion, who was with him in the car, did not testify, and no reason is given for the failure to produce him. Defendant produced three other witnesses, Walter Kulka, Emil Tangen and Carl Waldbauer. Waldbauer said he was driving north on Pulaski road; that plaintiff's car coming from the north cut in ahead of him in the intersection and made a left hand turn when the witness was about 80 feet from the intersection. The witness stopped and got out. The automobile that made the turn, he said, was not going "very fast." Kulka, a decorator and painter, testified that he was walking south in Pulaski road on the east side of the street north of the intersection. When he was on the north side of Roscoe, he saw defendant's car going west on Roscoe street. He then saw the car in which plaintiff was riding make a left turn; then he heard the two fenders smash "and that was all." This witness said defendant's car had stopped and that the other car struck defendant's car after it was stopped. Tangen, an employee of the Surface Lines, says he was just leaving a

Tanner, an employee of the Dallas Times, says he was just leaving
and that the other car struck defendant's car after it was stopped.
"and that was all." This witness said defendant's car had stopped
it was riding make a left turn; then he heard the two vehicles smash
car going west on Ross street. He then saw the car in which plain-
section. Then he was on the north side of Ross, he saw defendant's
in Bulinski road on the east side of the street north of the latter.
Kulka, a photographer and painter, testified that he was walking south
The automobile that made the turn, he said, was not going "very fast."
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he had been looking to the left to see if there was any moving traffic
Bulinski road and that when he applied the brakes slowly.
out of gear and left it in neutral because cars were parked on
a 1935 Plymouth four-door sedan, two doors off; that he took his car
defendant, twenty-three years of age, says he was driving

candy store on the northeast corner of the intersection and that he waited at the east curb line of Pulaski road and on the north cross walk of Roscoe street. He also says defendant's car stopped before the collision occurred.

Plaintiff was riding in the car driven by her husband. She was not in control of it, and it is not contended that the evidence tends to show she was in any way guilty of contributory negligence. The complaint charges general negligence of defendant, and in particular that he failed to apply the brakes, failed to keep a lookout for other cars lawfully using the streets and failed to give any warning by blowing a horn or otherwise. There was a motion for a directed verdict at the close of all the evidence, and defendant argues quite at length that it was error to refuse it. No evidence was offered by plaintiff in rebuttal and defendant says that his defense having been established by uncontradicted evidence, the instruction should have been given. Defendant cites cases such as Fuller v. DePaul University, 233 Ill. App. 261; Simons v. Dole Valve Co., 238 Ill. App. 286, and other cases holding that where an affirmative defense is established by uncontradicted evidence, an instruction requested by defendant in its favor should be given. The rule invoked is not applicable to this record. There was evidence tending to support the allegations of the complaint, and defendant admits that this was sufficient to make out a prima facie case. Other evidence was given by witnesses for defendant, which as a matter of fact, contradicted defendant's testimony.

In weighing all the evidence, plaintiff was entitled to have the benefit of all the evidence tended to prove and to have all just inferences which could be drawn from it regarded as true. If the jury could, without acting unreasonably in view of the law, find the issues of fact in her favor, then she was entitled to have her cause submitted to the jury. This is the rule laid down by the Supreme court in Libby, McNeill and Libby v. Cook, 222 Ill. 206, to which this

ready store on the northeast corner of the intersection and that he waited at the east curb line of Third Street and on the north crosswalk of Second Street. He also says defendant's car stopped before the collision occurred.

Plaintiff was riding in the car driven by her husband. The case was not in control of it, and it is not contended that the evidence tends to show she was in any way guilty of contributory negligence. The complaint charges general negligence of defendant, and in particular that he failed to stop his vehicle, failed to keep a lookout for other cars lawfully using the street and failed to give any warning by blowing a horn or otherwise. There was a motion for a directed verdict at the close of all the evidence, and defendant argues quite at length that it was error to refuse it. No evidence was offered by plaintiff in rebuttal and defendant says that the defense having been established by uncontested evidence, the instruction should have been given. Defendant cites cases such as Miller v. Federal University, 223 Ill. App. 221; Simons v. Iowa Valley Co., 223 Ill. App. 226, and other cases holding that where an affirmative defense is established by uncontested evidence, no instruction requested by defendant in its favor should be given. The rule invoked is not applicable to this record. There was evidence tending to support the allegations of the complaint, and defendant admits that this was sufficient to send out a jury trial case. Other evidence was given by witnesses for defendant, which as a matter of fact, contradicted defendant's testimony. In weighing all the evidence, the jury was entitled to give the benefit of all the evidence tended to prove and to have all facts interpreted as they are presented as true. If the jury could, without acting unreasonably in view of the law, find the issues of fact in her favor, then she was entitled to have her cause upheld as the jury. This is the rule laid down by the common law in Scott, Moffitt and Alphy v. Cook, 223 Ill. 206, to which this

court and the Supreme court have constantly adhered in a long line of cases of which plaintiff cites Holloy v. Chicago Rapid Transit Co., 335 Ill. 164; People v. Hanisch, 361 Ill. 465; White v. City of Belleville, 364 Ill. 877, and defendant cites Kelly v. Chicago City Railway Co., 283 Ill. 640. We hold the court did not err in denying the motion to instruct the jury in favor of defendant or in refusing to enter a judgment for defendant notwithstanding the verdict. Nor can we say, after giving attention to the evidence, that the verdict is so manifestly against the weight of the evidence as to require a reversal.

We are of the opinion that it was a question for the jury to determine whether, as a matter of fact, defendant was guilty of negligence at the time and place in question, in his failure to observe and warn or failure to stop his car in time to have prevented the accident. Defendant knew the intersection under all the circumstances was dangerous, as the evidence shows without contradiction. The jury had a right to believe that if he had been giving the attention to the road which the situation demanded the collision would not have occurred. Both parties were fortunate in that the injuries were not more severe. The law applicable to this case is perfectly clear. The material facts are not so clear but are of a kind and nature which under all the circumstances created issues properly submitted to the jury. We are not able to say that the jury acted unreasonably. It is not contended that the damages are excessive.

The judgment will be affirmed.

JUDGMENT AFFIRMED.

O'Connor, P.J., and McSurely, J., concur.

court and the evidence must have necessarily appeared in a form of
 some of which plaintiff's expert witness testified.

See Ill. 194; People v. Hancock, 233 Ill. 444; White v. Day, 22

Ill. 194, 233 Ill. 444, and defendant's expert witness testified

Belknap v. ..., 233 Ill. 444. We hold the court did not err in holding

the action to present the jury in favor of defendant or in refusing

to enter a judgment for defendant notwithstanding the verdict. Nor

can we say, after giving attention to the evidence, that the verdict is

so manifestly against the weight of the evidence as to require a re-

versal.

We are of the opinion that it was a question for the jury

to determine whether, as a matter of fact, defendant was guilty of

negligence at the time and place in question, in his failure to ob-

serve and warn or attempt to stop his car in time to have prevented

the accident. Defendant bears the burden of proof on this point.

Somehow we are disposed, as the evidence shows without contradiction,

the jury had a right to believe that it had been giving the at-

tention to the road which the attention furnished the collision would

not have occurred. Both parties were responsible in that the injuries

were not more severe. The law applicable to this case is perfectly

clear. The material facts are not so clear but are of a kind and

nature which under all the circumstances created issues properly sub-

mitted to the jury. We are not able to say that the jury acted un-

reasonably. It is not contended that the damages are excessive.

The judgment will be affirmed.

JUSTICE AFFIRMED.

O'Connor, J., and McHenry, J., concur.

41308

METROPOLITAN LIFE INSURANCE COMPANY,
a Corporation,

Appellee,

EVA JOKIEL,

and

LEONARD JOKIEL, et al.,

Appellant,

Appellees.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

307 I.A. 550²

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Emanuel Jokiel died November 12, 1936. He held a life insurance policy in the plaintiff insurance company for \$1,000, issued May 1, 1930. This insurance policy when issued named Eva Jokiel, wife of Emanuel, as beneficiary. It also gave to the insured the right to change the beneficiary. May 8, 1938, Emanuel Jokiel made a written request for change of the beneficiary asking that his son, Leonard Jokiel, a minor, be substituted. About April 11, 1939, the insurance company had received a request for a duplicate policy in the form of an affidavit which purported to have been executed by Emanuel Jokiel and defendant, Eva Jokiel. The affidavit stated that the original policy was lost and could not be found. A duplicate policy was issued and the insurance company indorsed upon it the name of Leonard Jokiel as beneficiary. The insured died, as above stated, leaving no estate whatsoever.

Eva Jokiel, who had possession of the original policy, made arrangements for a funeral for the deceased to cost \$600, executed her note to the undertaker, Mr. Winiarski, for that amount, assigning the original policy as security. Mr. Winiarski discounted the note with the Memorial Service, Inc. When the Memorial Service, Inc. undertook proof of its claim with the insurance company, it was informed that proof had already been made by the new beneficiary, Leonard Jokiel, and also was informed of the issuance of the duplicate policy.

Plaintiff on June 7, 1939, filed its bill of complaint

ALIAS

MANUEL JOKIEL, alias, born [illegible]

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against Eva Jokiel, Leonard Jokiel and Memorial Service, Inc., setting up these facts; also, that a loan had been made upon the policy in his lifetime by Emanuel Jokiel; admitting a liability of \$780.87 less cost of suit; praying that the claimants might be required to interplead among themselves, and that further suits should be enjoined.

The evidence was heard in open court and a decree was entered February 26, 1940, finding the amount due, less costs, to be \$757.57, which plaintiff was ordered to pay forthwith to the clerk of the court, which the clerk was directed to pay to Leonard Jokiel upon his attaining his majority on June 1, 1943, or sooner to his legal guardian, and that further suits by the parties should be enjoined. From this decree Eva Jokiel and the Memorial Service, Inc. gave notice of separate appeals.

It is contended in the first place that Eva Jokiel is entitled to the proceeds upon the theory that one who acquires a beneficial interest in an insurance policy by the payment of premiums thereon under an agreement that she shall be the beneficiary cannot in equity be defeated by the substitution of a new beneficiary without her knowledge or acquiescence. The proposition is good law as held in cases cited. Supreme Council, B. A. v. McInight, 238 Ill. 349; Columbian Circle v. Mudra, 298 Ill. 599; Order of Columbian Knights v. Matzel, 184 Ill. App. 15; women's Catholic Order of Foresters v. Hill, 181 Ill. App. 639, and Leaf v. Leaf, 92 Ky. 186. The proposition, however, is not applicable to the facts of this case for the reason that the evidence fails to show that Eva Jokiel had such an agreement with Emanuel Jokiel or that she made such payment of the premiums. Indeed, in her answer Eva Jokiel does not claim the proceeds of the property upon that theory but on the contrary that there was no effective substitution of Leonard Jokiel as named beneficiary.

Her testimony is to the effect that she was married to Emanuel Jokiel, August 27, 1929. Each of them had contracted a former marriage by which they had children. Emanuel and Eva lived together

against the Jekels, Leonard Jekel and Herman Jekel, Inc., setting up these facts; also, that a loan had been made upon the policy in his lifetime by Herman Jekel; admitting a liability of \$750.00 less cost of suit; praying that the claimants might be permitted to interplead among themselves, and that further suit should be enjoined.

The evidence was heard in open court and a decree was entered February 26, 1930, finding the account due, less costs, to be \$757.87, which plaintiff was ordered to pay to Leonard Jekel upon the court, when the clerk was directed to pay to Leonard Jekel upon his returning his majority on June 1, 1930, or account to his legal guardian, and that further suit by the parties should be enjoined.

From this decree the Jekels and the Hospital Appeal, Inc., have petitioned for review.

It is contained in the first place that the Jekel is entitled to the proceeds upon the policy and the Hospital Appeal, Inc., is entitled to an insurance policy by the payment of premiums thereon under an agreement that the shall be the beneficiary named in policy be defended by the substitution of a new beneficiary without her knowledge or acquiescence. The proposition as good law as held in James v. James, 191 Ill. App. 2d 4, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 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2759, 2760, 2761, 2762, 2763, 2764, 2765, 2766, 2767, 2768, 2769, 2770, 2771, 2772, 2773, 2774, 2775, 2776, 2777, 2778, 2779, 2780, 2781, 2782, 2783, 2784, 2785, 2786, 2787, 2788, 2789, 2790, 2791, 2792, 2793, 2794, 2795, 2796, 2797, 2798, 2799, 2800, 2801, 2802, 2803, 2804, 2805, 2806, 2807, 2808, 2809, 2810, 2811, 2812, 2813, 2814, 2815, 2816, 2817, 2818, 2819, 2820, 2821, 2822, 2823, 2824, 2825, 2826, 2827, 2828, 2829, 2830, 2831, 2832, 2833, 2834, 2835, 2836, 2837, 2838, 2839, 2840, 2841, 2842, 2843, 2844, 2845, 2846, 2847, 2848, 2849, 2850, 2851, 2852, 2853, 2854, 2855, 2856, 2857, 2858, 2859, 2860, 2861, 2862, 2863, 2864, 2865, 2866, 2867, 2868, 2869, 2870, 2871, 2872, 2873, 2874, 2875, 2876, 2877, 2878, 2879, 2880, 2881, 2882, 2883, 2884, 2885, 2886, 2887, 2888, 2889, 2890, 2891, 2892, 2893, 2894, 2895, 2896, 2897, 2898, 2899, 2900, 2901, 2902, 2903, 2904, 2905, 2906, 2907, 2908, 2909, 2910, 2911, 2912, 2913, 2914, 2915, 2916, 2917, 2918, 2919, 2920, 2921, 2922, 2923, 2924, 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3755, 3756, 3757, 3758, 3759, 3760, 3761, 3762, 3763, 3764, 3765, 3766, 3767, 3768, 3769, 3770, 3771, 3772, 3773, 3774, 3775, 3776, 3777, 3778, 3779, 3780, 3781, 3782, 3783, 3784, 3785, 3786, 3787, 3788, 3789, 3790, 3791, 3792, 3793, 3794, 3795, 3796, 3797, 3798, 3799, 3800, 3801, 3802, 3803, 3804, 3805, 3806, 3807, 3808, 3809, 3810, 3811, 3812, 3813, 3814, 3815, 3816, 3817, 3818, 3819, 3820, 3821, 3822, 3823, 3824, 3825, 3826, 3827, 3828, 3829, 3830, 3831, 3832, 3833, 3834, 3835, 3836, 3837, 3838, 3839, 3840, 3841, 3842, 3843, 3844, 3845, 3846, 3847, 3848, 3849, 3850, 3851, 3852, 3853, 3854, 3855, 3856, 3857, 3858, 3859, 3860, 3861, 3862, 3863, 3864, 3865, 3866, 3867, 3868, 3869, 3870, 3871, 3872, 3873, 3874, 3875, 3876, 3877, 3878, 3879, 3880, 3881, 3882, 3883, 3884, 3885, 3886, 3887, 3888, 3889, 3890, 3891, 3892, 3893, 3894, 3895, 3896, 3897, 3898, 3899, 3900, 3901, 3902, 3903, 3904, 3905, 3906, 3907, 3908, 3909, 3910, 3911, 3912, 3913, 3914, 3915, 3916, 3917, 3918, 3919, 3920, 3921, 3922, 3923, 3924, 3925, 3926, 3927, 3928, 3929, 3930, 3931, 3932, 3933, 3934, 3935, 39

for eight years, but in January, 1938, he went to live with his daughter for financial reasons. She says she got the insurance policy six months after their marriage and had it all the time afterward. She says, "I save the money that I pay for this policy while I had it in my possession. I pay every month." Again she says, "I save money. A loan was made on the policy because I needed money because he was sick. I paid on the policy \$6.00 every month for eight years. I got the \$5.00 monthly from saving it. I got money from my son and from Mr. Jokiel's son. I pay, I save. I got money from a daughter, she is good. I save my money, they work, my husband work, my two sons work. I save. William gave me money and my two sons and I pay policy."

William Jokiel, the son of Emanuel Jokiel by his former marriage, was called as a witness by Eva. He testified that he lived with his father and Mrs. Eva Jokiel for eight years after they were married, and he lived with Eva Jokiel up to the time he was married to her niece. He says, "I was paying the premium from time to time as were the other boys. I did not have any conversation with Mattie Neft [daughter of Emanuel] wherein she specifically asked me to pay the current premium. *** The children started paying the premiums on the policy in 1938 after dad was taken to the hospital and after he separated from Eva Jokiel. Before January, 1938, Eva Jokiel paid the premiums. Eva Jokiel made payments for eight years."

The re-cross examination of William Jokiel was as follows:
 "Q. She (Eva Jokiel) made payments during all the eight years? A. Yes. Q. Do you know where she got the money? Mr. Rubenstein: That is objected to, if the court please. The witness: A. My dad (deceased) was working. Mr. Hofeld: Q. And he gave her the money out of his own pocket? The witness: He was working. Q. And she physically paid the premium? A. No. Q. The money that Eva paid the--- A. He was her husband. She was entitled to it. Q. Did you see him give her the money? A. The check, all that he was earning, every week, he was

for eight years, but in January, 1935, he went to live with his daughter for financial reasons. The next day the insurance policy six months after their marriage and had it all the time afterwards. The says, "I gave the money then I pay for this policy while I had it in my possession. I pay every month." Again she says, "I gave money. A loan was made on the policy because I needed money because he was sick. I paid on the policy \$2.00 every month for eight years. I got the \$2.00 monthly from saving it. I got money from my son and from Mr. Jokiel's son. I pay, I save. I got money from a daughter, she is dead. I was at home, they were at home, at that time, at that time. I save. William gave me money and my two sons and I pay policy." William Jokiel, the son of Emanuel Jokiel of his former marriage, was called as a witness by her. He testified that he lived with his father and Mrs. Eve Jokiel for eight years after they were married, and he lived with Mr. Jokiel up to the time he was married to her niece. He says, "I was paying the premium from time to time as was the first year. I did not have any contribution after that with [daughter of Emanuel] wherein she specifically asked me to pay the current premium." The children started paying the premiums on the policy in 1933 after Dad was taken to the hospital and after he was released from Eve Jokiel. Before January, 1935, Eve Jokiel paid the premium. Eve Jokiel made payments for eight years."

The witness examination of William Jokiel was as follows:

"Q. The (Eve Jokiel) made payments during all the eight years? A. Yes. Q. Do you know where she got the money? Mr. Independent: That is objected to, it is hearsay. The witness (A. to his testimony) was working. Mr. Jokiel: A. And he gave her the money out of his own pocket? The witness: He was working. A. And she specifically paid the premium? A. No. A. The money that Eve paid the--- A. He was her husband. She was entitled to it. Q. Did you see him give her the money? A. The wife, all that he was working, that was the

turning in. Q. How much from time to time did he give her from his own money to pay these premiums? Mr. Rubenstein: If he knows. The witness: A. He was giving in the whole check. Mr. Hofeld: Q. He would give her, Eva, the whole check and she would go down and pay the premiums? The witness: A. She was paying the premiums out of that money. Q. Did he give her a check to pay the premiums? A. He was living with her and supporting her. Q. And what she had left over was here? A. Yes."

This evidence from a witness friendly to Eva Jokiel and called by her shows she did not make payment of premiums out of her own funds but only out of the earnings of her husband, the insured.

Harriet Neft, daughter of Emanuel, testified that Emanuel Jokiel lived at her brother's house a few days prior to New Year's Eve of 1938; that he lived at her home from the latter part of January, 1939, until the latter part of April, 1939, continuously; that he then went to the home of William Kubistal, a son-in-law, with whom he stayed for about two or three weeks; that he went to the hospital in the middle part of May and stayed there until June, 1939, and came back to her home about the 20th of June. He was in the hospital a month before his death. She testified that she had no interest in this policy other than "we paid the premium. The first premium was paid either in December of 1937, or January, 1938, by my father. The children all contributed to the payment of the premium."

The theory of Mrs. Jokiel's answer was that there was no valid change of the beneficiary. She denied Emanuel requested the company to change the beneficiary and denied she had signed an affidavit and release with Emanuel stating that the original policy had been lost or destroyed. She avers that the duplicate policy was obtained by fraud and misrepresentation; that the original policy was at all times in her possession and was at no time lost or destroyed.

turning in. I know much from time to time that he give her two the
own money to pay these promissory. Mr. Subsequent in the house. The
Witness A. He was giving in the whole check. Mr. Subsequent: A. He
would give her. Yes, the whole check and the money he had and the
the agreement. The witness A. He was giving the money out of the
money. A. He was giving her a check in the agreement. A. He was
living with her and Subsequent Mr. A. And what she had left over was
money. A. Yes.

This evidence from a witness friendly to the defendant and
called by her shows she did not make payment of promissory out of her
own funds but only out of the earnings of her husband, the defendant.
Harriet Wolf, daughter of defendant, testified that defendant
lived at her brother's house a few days after he was taken to
of 1938; that he lived at her home from the latter part of January,
1938, until the latter part of April, 1938, approximately; that he
then went to the home of William Industrial, a son-in-law, with whom he
stayed for about two or three weeks; that he went to the hospital in
the middle part of May and stayed there until June, 1938, and came
back to her home about the 20th of June. He was in the hospital a
month before his death. She testified that she had no interest in
this policy other than "she paid the premium. The first premium was
paid either in December of 1937, or January, 1938, by my father. The
children all contributed to the payment of the premium."
The theory of Mrs. Lohr is answer was that there was no
valid change of the beneficiary. The federal marshal requested the
company to change the beneficiary and failed to do so and signed an
affidavit and release of the company stating that the original policy
had been lost or destroyed. She avers that the duplicate policy was
obtained by fraud and misrepresentation from the original policy
was at all times in her possession and was at all times lost or
destroyed.

The evidence shows that May 6, 1938, the insured presented to the insurance company a written request that his son, Leonard Jokiel, should be named as beneficiary to receive the proceeds of the policy in the event of his death. The document is signed by Emanuel Jokiel by his mark and is witnessed by Walter Heft. A paper carrying the legend "to be executed by the insured and the beneficiary" and described as "Affidavit With Release and Agreement," had been filed with the insurance company about April 11. It purports to be executed by Emanuel Jokiel and Eva Jokiel, is signed by Emanuel Jokiel by his mark, and purports to be signed by Eva Jokiel by her mark, and subscribed and sworn to before William Kubistal, a notary public. The instrument is under seal.

William Kubistal testified he saw this instrument, which appears in evidence as Leonard Jokiel's exhibit 1, at his office on April 11, 1938; that Emanuel Jokiel and Walter Heft were also present; that he saw Emanuel sign it and knew the signature to be genuine and correct; that at that time it purported to bear the mark of Eva Jokiel. Walter Heft brought Emanuel Jokiel to his office, and Emanuel asked him to acknowledge his signature. He put on the acknowledgment and also acknowledged the signature of Eva Jokiel by mark, and gave the instrument back to Emanuel Jokiel. He had been a notary public for fifteen years and admitted he did not see Eva Jokiel for two and one-half years prior to April 11. He saw her twice after that time when she visited Emanuel at his home. He did not know who put in the words "Eva Jokiel" and her mark. He (the witness) did not do it and he did not see Eva Jokiel make the mark. Emanuel Jokiel was living with Walter Heft at this time. When he acknowledged the signature of Emanuel Jokiel he administered the oath to him as a notary public, then affixed his own signature as notary.

Eva Jokiel testified she did not make the mark, that she never appeared before Kubistal and that she had never told anyone the

The evidence shows that May 6, 1933, the insured, deceased, to the insurance company a written request that his son, Leonard Jekiel, should be named as beneficiary to receive the proceeds of the policy in the event of his death. The document is signed by Leonard Jekiel by his mark and is witnessed by Walter Wolf. A paper containing the legend "to be executed by the insured and the beneficiary" and described as "Affidavit with Release and Agreement," had been filed with the insurance company about April 11. It purports to be executed by Leonard Jekiel and the Jekiel, is signed by Leonard Jekiel by his mark, and purports to be signed by the Jekiel by her mark, and subscribed and sworn to before William Jekiel, a Notary Public. The instrument is under seal.

William Jekiel testified he saw this instrument, which appears in evidence as Leonard Jekiel's exhibit A, at his office on April 11, 1933; that Emanuel Jekiel and Walter Wolf were also present; that he saw Emanuel sign it and knew the signature to be genuine and correct; that at that time it purported to have the mark of Eve Jekiel. Walter Wolf brought Emanuel Jekiel to his office, and Emanuel asked him to acknowledge his signature. He put on the acknowledgment and also acknowledged the signature of the Jekiel by mark, and gave the instrument back to Emanuel Jekiel. He had been a Notary Public for fifteen years and admitted he did not see the Jekiel the day and one-half years prior to April 11. He saw her twice after that time when she visited Emanuel at his home. He did not know who put in the words "Eve Jekiel" and her mark. He (the witness) did not do it and he did not see Eve Jekiel make the mark. Emanuel Jekiel was living with Walter Wolf at this time. When he acknowledged the signature of Emanuel Jekiel he administered the oath to him as a Notary Public, then affixed his own signature as Notary.

Eve Jekiel testified she did not make the mark, that she never appeared before Jekiel and that she had never told anyone the

policy was lost. The evidence shows Eva Jokiel did not join in executing the instrument described as "Affidavit with Release and Agreement." There is, however, abundant evidence that the signature of Emanuel to this paper was genuine; also the writing filed on May 6, in which he requested his son, Leonard, be substituted as beneficiary.

The execution of the joint document filed April 11, was unnecessary in order to effect the change. When the written request of Emanuel Jokiel was filed on May 6 with the insurance company, the maxim that equity regards that as done which ought to be done became applicable, and the beneficiary was changed from Eva to Leonard. Emanuel Jokiel had done everything he could do. His intention was manifest and equity would carry it out. Kavanaugh v. New England Mutl. Life Ins. Co., 230 Ill. App. 72; Sun Life Assurance Co. v. Williams, 284 Ill. App. 222.

It follows the court did not err in decreeing Leonard Jokiel to be the beneficiary of the policy and that Eva Jokiel had no vested right in it. The Memorial Service, Inc., as assignee, had no greater rights than the assignor, Eva Jokiel, in whose shoes it stands. A policy of life insurance is not a negotiable instrument and one who holds it cannot by transferring it (in the absence of estoppel) give a better title than he has. People v. Michigan Ave. Trust Co., 233 Ill. App. 428; Fatek v. Bain, 293 Ill. App. 405. Memorial Service Inc. must look elsewhere for the collection of its claim of \$600. The judgment of the trial court will be affirmed.

JUDGMENT AFFIRMED.

O'Connor, P.J., and McSurely, J., concur.

policy was lost. The evidence shows that John did not join in

executing the instrument described as "WILLIAMS v. JOHN" with John and

agreement. There is, however, abundant evidence that the signature

of John to this paper was genuine; also the writing filed on May

8, in which he requested his son, John, to substitute as

beneficiary.

The execution of the joint document filed April 11, was un-

necessary in order to effect the change. When the written request of

John was filed on May 8 with the insurance company, the

claim that equity requires that as done which ought to be done because

equitable, and the beneficiary was changed from John to himself.

John did not do anything he could do. His intention was

manifest and equity would carry it out. Williams v. John

Williams v. John, 111 Ill. App. 2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

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It follows that the court did not act in assuming to change John

to be the beneficiary of the policy and that the John had no vested

right in it. The Memorial Service, Inc., as assignee, had no

greater rights than the assignor, the John, in whose stead it

stands. A policy of life insurance is not a negotiable instrument and

one who holds it cannot by transferring it (in the absence of estoppel)

give a better title than he has. Beck v. John, 111 Ill. App. 2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545,

41353

ADELAIDE EBEL,

Appellant,

APPEAL FROM

v.

CIRCUIT COURT,

ALEXANDER GASOLOFF, also known
as ALEX GASOLOFF, and Wm.

COOK COUNTY.

PATRICK A. SULLIVAN,

Appellees.

307 I.A. 551

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff filed an amended complaint charging that her physician, Dr. Patrick A. Sullivan, and her landlord, Alexander Gasoloff, without probable cause instituted proceedings in the County court of Cook county to have her declared insane. Paragraph 4 of the complaint averred Sullivan caused his signed certificate to be filed with the clerk of the County court to the effect that he examined plaintiff and believed her to be mentally deranged and in need of treatment; that Gasoloff went to the office of the clerk and made application on oath "to try the question of insanity" in the matter. Paragraph 5 averred defendants knew the things said to have been alleged by them in paragraph 4 were known to be false. Paragraph 6 stated by reason of defendants' actions a warrant issued for the arrest of plaintiff; that she was taken to the Cook County Psychopathic Hospital and detained there until September 10, 1937, when she was released by the hospital authorities.

Gasoloff answered denying he had acted with Sullivan in the matter without probable cause, and denied the averments of paragraph 4 of the complaint. As to the alleged acts of Dr. Sullivan, he said he was not informed but denied he (Gasoloff) signed any false statements or that plaintiff was imprisoned because of anything done by him.

Sullivan by answer admitted he signed the certificate stating he had examined plaintiff and believed her mentally insane, etc. He further answered that an examination made for him of the records in the County court showed that Gasoloff, on August 24, 1937,

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MR. JUSTICE MONTGOMERY DELIVERED THE OPINION OF THE COURT.

Plaintiff filed an amended complaint charging that her

physician, Dr. William A. Sullivan, and her husband, defendant,

defendant, without probable cause instituted proceedings in the County Court of Cook County to have her declared insane. Paragraph 4 of the

complaint averred Sullivan caused his signed certificate to be filed

with the clerk of the County Court to the effect that he examined

plaintiff and believed her to be mentally deranged and in need of

sequestration; that defendant, as the officer of the court, was duly

petitioned on oath "to try the question of insanity" in the matter,

Paragraph 5 averred defendant knew the things said to have been al-

leged by them in paragraph 4 were known to be false. Paragraph 6

stated by reason of defendant's actions a warrant issued for the

arrest of plaintiff; that she was taken to the Cook County Jail

County Hospital and detained there until September 10, 1937, when she

was released by the hospital authorities.

Defendant answered denying he had acted with Sullivan in the

matter without probable cause, and denied the averments of paragraph

4 of the complaint. As to the alleged acts of Dr. Sullivan, he said

he was not informed but denied he (Sullivan) signed any false state-

ments or that plaintiff was imprisoned because of anything done by

him.

Sullivan by answer admitted he signed the certificate

stating he had examined plaintiff and believed her mentally insane,

etc. He further answered that an examination made for him of the

records in the County Court showed that defendant, on August 24, 1937,

appeared at the office of the clerk of the court and signed an application to try the question of plaintiff's insanity; that in this application Gascoff said he believed plaintiff insane and that her own and the welfare of others required her restraint or commitment; that the records further showed the application was sworn to before the clerk and delivered to him, and "this defendant states that he has no further information or knowledge."

As defense number two defendant Sullivan stated that September 1, 1937, on the report of a commission duly appointed by order of the County court, plaintiff's disease was found to be schizophrenic psychosis paranoid trend, and that she was adjudged by the court to be "an insane person." As defense number three defendant Sullivan alleged "The certificate made by him, on, to-wit: August 24, 1937, was in the nature of evidence required by the statute of the state of Illinois in a proceeding to try the question of insanity of the plaintiff, and was made in good faith, with probable cause, and without ulterior motives."

A replication by plaintiff was stricken with leave to file an amended reply, which was filed and is: "In reply to defense number two (2) of the defendant, Dr. Patrick A. Sullivan, plaintiff states that she made an investigation in the office of the clerk of the County Court of Cook County, Illinois, in the matter of the alleged insanity of the plaintiff, Adelaide Ibel (No. 140310); that said investigation discloses that a commission was appointed by the Court in said case consisting of Dr. Morris Braude, Dr. E. G. Hower and Acting Judge William G. Knoch of said court; that while it appears from the records of said cause that on September 1, 1937, said commission reported that plaintiff's mental disease was found to be schizophrenic psychosis paranoid trend, said report was either immediately, or shortly thereafter, countermanded and thereby rendered

appeared at the office of the clerk of the court and signed an application to try the question of plaintiff's insanity; that in this application plaintiff said he believed plaintiff insane and that he was and the failure of others to appear was not a bar to the trial; that the records further showed the application was taken up before the clerk and delivered to him, and that plaintiff stated that he had no further information or knowledge.

An answer number two defendant Sullivan dated June 1, 1937, on the ground of insanity was filed in the order of the county court, plaintiff's answer was taken up by the court to be "an insane person," is defendant number three defendant Sullivan alleged "The certificate made by him, on, to-wit: August 24, 1937, was in the nature of evidence required by the statute of the State of Illinois in a proceeding to try the question of insanity of the plaintiff, and was made in good faith, with probable cause, and without ulterior motives."

A replication by plaintiff was taken up with leave to file an amended reply, which was filed and set in reply to defendant number two (2) of the defendant, Dr. William A. Sullivan, plaintiff states that she made an investigation in the office of the clerk of the county court of Cook County, Illinois, in the matter of the alleged insanity of the plaintiff, wherein she (No. 190012); that said investigation disclosed that a commission was appointed by the court to visit with a committee of Dr. William A. Sullivan and Acting Judge William A. Knack of said court; that while it appears from the records of said court that on September 1, 1937, said commission reported that plaintiff's mental disease was found to be

null and void and the signatures of said physicians to said report obliterated; that through mere inadvertance (so the undersigned was informed by a deputy clerk of said court) the name of Acting Judge William O. Knoch, of said court was not obliterated from said report, thereby making it appear like a judgment order that was authentic, when as a matter of fact it is not. Said investigation on the part of plaintiff further discloses that no judgment order appears in said insanity proceedings in said court, except as heretofore stated; that said insanity proceedings were ordered dismissed by said judge on to-wit: the 9th day of September, 1937, whereupon the plaintiff was released from custody the following day, September 10, 1937. The undersigned has been informed by a deputy clerk in the office of the clerk of the County Court of Cook County, Illinois, that the said alleged report of said commissioners was and is an error that beclouds the record of said proceedings, making it appear that plaintiff was thereby declared insane, when in truth and in fact she was not. Plaintiff prays that on the trial of this cause that said defendant be precluded from offering a transcript of said report of said commissioners in evidence as alleged in his defense number two (2) as incompetent and legally insufficient; also from offering any other evidence in support thereof."

Defendants moved to strike this reply. The motion was sustained. Plaintiff elected to stand on her reply. Judgment was entered for defendants, and plaintiff appeals.

Plaintiff argues that under the Civil Practice act (Ill. Rev. Stats. 1939, ch. 110, §45, p. 2417) the motion to strike or dismiss takes the place of a demurrer, and that the reply as to defense number two of Sullivan presents a perfect defense.

Defendants say the amended reply was bad because the matters contained in it were neither stated positively nor on information or belief as required by §35 of the Civil Practice act (Smith-Gurd Anno. Stats. par. 159, p. 176). This is not only the rule required

will and void and the signature of said physician to said report obliterated; that through mere inadvertence (as the undersigned was informed by a deputy clerk of said court) the name of Acting Judge William G. Knox, of said court was not obliterated from said report, thereby making it appear like a judgment when it was not.

Even as a matter of fact it is not. This investigation on the part of plaintiff further discloses that no judgment order appears in said instantly proceedings in said court, except as heretofore stated; that said instantly proceedings were ordered dismissed by said judge on 20th day of September, 1937, whereupon the plaintiff was released from custody the following day, September 10, 1937. The undersigned has been informed by a deputy clerk in the office of the clerk of the County Court of Cook County, Illinois, that the said alleged report of said commissioners was and is an error and belongs the record of said proceedings, making it appear that plaintiff was thereby deceived herein, when in truth and in fact she was not.

Plaintiff prays that on the trial of this cause that said defendant be precluded from offering a transcript of said report of said commissioners in evidence as alleged in his defense number two (2) as incompetent and legally irrelevant; also from offering any other evidence in support thereof.

Defendants moved to strike this reply. The motion was sustained. Plaintiff elected to stand on her reply. Judgment was entered for defendants, and plaintiff appeals.

Plaintiff argues that under the Civil Practice Act (Ill. Rev. Stat. 1930, ch. 110, § 215) the motion to strike or eliminate from the pleadings a document, and that the reply to be filed by the defendant is a document, and that the reply to be filed by the defendant is a document, and that the reply to be filed by the defendant is a document.

Defendants say the amended reply was bad because the matters contained in it were neither stated positively nor on information or belief as required by 233 of the Civil Practice Act (Illinois-Ann. Stat. 1930, ch. 110, § 215). This is not only the rule contained

by this section of the Civil Practice act but was the law prior to its enactment. Salton v. Westwood, 73 Ill. 125-29; Murphy v. Murphy, 189 Ill. 360-66.

The pleading was deficient in the respects pointed out. It was also defective in that it questioned the validity of an admitted judgment of a court of record collaterally, which is not permitted. Matthews v. Dener, 292 Ill. 532. That the rule is applicable to a proceeding in the County court to try the question of insanity, see Monts v. Moore, 199 Ill. App. 270.

The defense of defendants as stated in their answers was conclusive upon the merits in the absence of a reply. The reply was properly stricken. Plaintiff elected to stand on her reply and final judgment for the defendants was, therefore, properly entered. Weiss v. Binnian, 178 Ill. 241-45.

The judgment is affirmed.

JUDGMENT AFFIRMED.

O'Connor, P.J., and McSurely, J., concur.

by this section of the Civil Practice Act and the law prior to
the amendment. Wright v. Wright, 130 Ill. 230-33.

The pleading was deficient in the respects pointed out. It
was also defective in that it questioned the validity of an admitted
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Wright v. Wright, 130 Ill. 230-33. That the rule is applicable to a
proceeding in the County Court to try the question of insanity, see
Wright v. Wright, 130 Ill. 230-33.

The defense of delinquency as stated in their answer was
conclusive upon the merits in the absence of a reply. The reply was
properly stricken. Plaintiff elected to stand on her reply and thus
foregoes the defense of delinquency. Wright v. Wright, 130 Ill. 230-33.

The judgment is affirmed.
JUDGMENT AFFIRMED.
O'Connor, J.J., and McHenry, J., concur.

41119

PEOPLE OF THE STATE OF ILLINOIS
ex rel. MERCANTILE NATIONAL BANK
OF CHICAGO, a banking corporation,
Appellee,

v.

CITY OF CHICAGO, a municipal
corporation, et al.,

Appellants.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

\$07 I.A. 667

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Industrial Refuse Disposal Company obtained a judgment against the City of Chicago on April 22, 1936, in the sum of \$79,645. October 11, 1938, that judgment was assigned to the relator, Mercantile National Bank of Chicago. Demand having been made by relator for the payment of the judgment, and the city and its officials having failed to pay the sum, relator as assignee filed its petition in the Circuit court for a writ of mandamus to compel payment. The city and other respondents filed their answer, the cause was fully tried by the court and a writ was issued directing respondents to pay the relator the sum claimed. This appeal is prosecuted to reverse the order thus entered.

Respondents' answer admits the entry of the judgment, but denies the possession of sufficient funds to pay the same; it avers the levy and collection of taxes for the payment of judgments and the payment on account of judgments in excess of the amounts levied; it further avers that the judgment in question was not next in the order of payment, and sets forth section 88 of the Revised Chicago Code of 1931, providing for the payment of judgments in their order of entry and that judgments to the extent of \$240,749 remained unpaid prior to the entry of plaintiff's judgment. The answer further avers the levy of \$110,000 in the year 1936 for the payment of judgments, \$115,000 for the year 1937, and \$115,000 for the year 1938. From the stipulation of the parties, made upon the hearing,

41113

PROVINCE OF THE STATE OF ILLINOIS
EX REL. MORGANVILLE NATIONAL BANK
OF CHICAGO, a banking corporation,
Appellee,

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

80714.667

CITY OF CHICAGO, a corporation,
Appellant.

MR. PRESIDING JUSTICE FRANK DELIVERED THE OPINION OF THE COURT.

Industrial Union Disposal Company obtained a judgment

against the City of Chicago on April 22, 1936, in the sum of \$79,645. October 11, 1938, that judgment was assigned to the relator, Morganville National Bank of Chicago. Demand having been made by relator for the payment of the judgment, and the city and its officials having failed to pay the sum, relator as assignee filed its petition in the Circuit court for a writ of mandamus to compel payment. The city and other respondents filed their answer, the cause was fully tried by the court and a writ was issued directing respondents to pay the relator the sum claimed. This appeal is prosecuted to reverse the order thus entered.

Respondents' answer admits the entry of the judgment, but denies the possession of sufficient funds to pay the same; it avers the levy and collection of taxes for the payment of judgments and the payment on account of judgments in excess of the amounts levied; it further avers that the judgment in question was not next in the order of payment, and sets forth section 88 of the Revised Chicago Code of 1931, providing for the payment of judgments in their order of entry and that judgment for the sum of \$240,749 remained unpaid prior to the entry of plaintiff's judgment. The answer further avers the levy of \$110,000 in the year 1936 for the payment of judgments, \$115,000 for the year 1937, and \$115,000 for the year 1938. From the stipulation of the parties, made upon the hearing,

it appears that the total amount of collections of taxes for the years 1936 to 1938 inclusive, applicable to the payment of judgments and interest, is \$261,314.50, and the evidence discloses that during these years the city paid judgments with moneys from its Corporate Purposes Fund in the sum of \$641,711.88. This aggregate amount includes the sum of approximately \$600,000 paid pursuant to an order for a writ of mandamus to policemen and firemen who were illegally discharged. These payments were made in 1939, under an order in the firemen's and policemen's case entered in July, 1938. That order does not direct the City of Chicago and the other respondents to pay the approximate sum of \$600,000 out of the judgment fund for which appropriations had been made for the years 1936 to 1938, inclusive, and in which collections had been made in the aggregate amount of \$261,314.50. Nevertheless, the principal defense interposed by respondents is that the city has paid out on judgments more money than was levied and collected for that purpose, and that by reason thereof the city has done everything within its power to provide for the payment of petitioner's judgment. It is also argued that there are unpaid judgments prior to the relator's, which by ordinance must be paid first; that there is no money with which to pay these judgments, and that all moneys now in the corporate purposes fund are required for the ordinary and necessary expenses of the city.

As the principal ground for reversal it is urged that the undisputed evidence discloses that the City of Chicago has no moneys available for the payment of petitioner's judgment. There is no dispute as to the facts. The judgment was entered as alleged, and assigned to the relator. Demand was made upon the city, but the judgment was not paid. The gravamen of the dispute is whether or not the financial condition of the city is such that it can be compelled to pay the judgment. After the city had been ordered by mandamus to pay the policemen and firemen the sum of \$600,000, the comptroller treated this payment as a judgment against the city,

it appears that the total amount of collections of taxes for the years 1936 to 1938 inclusive, applicable to the payment of judgments and interest, is \$261,314.70, and the evidence discloses that during these years the city paid judgments with moneys from its Corporate Purposes Fund in the sum of \$641,711.62. This aggregate amount includes the sum of approximately \$600,000 paid pursuant to an order for a writ of mandamus to policemen and firemen who were illegally discharged. These payments were made in 1939, under an order in the firemen's and policemen's cases entered in July, 1938. That order does not direct the City of Chicago and the other respondents to pay the approximate sum of \$600,000 out of the judgment fund for which appropriations had been made for the years 1936 to 1938, inclusive, and in which collections had been made in the aggregate amount of \$261,314.70. Nevertheless, the principal defense interposed by respondents is that the city had paid out on judgments more money than was levied and collected for that purpose, and that by reason thereof the city has done everything within its power to provide for the payment of petitioner's judgment. It is also argued that there are unpaid judgments prior to the relator's, which by ordinance must be paid first; that there is no money with which to pay these judgments, and that all moneys now in the corporate purposes fund are required for the ordinary and necessary expenses of the city. As the principal ground for reversal it is urged that the undisputed evidence discloses that the City of Chicago has no moneys available for the payment of petitioner's judgment. There is no dispute as to the facts. The judgment was entered as alleged, and assigned to the relator. Demand was made upon the city, but the judgment was not paid. The gravamen of the dispute is whether or not the financial condition of the city is such that it can be compelled to pay the judgment. After the city had been ordered by mandamus to pay the policemen and firemen the sum of \$600,000, the comptroller treated this payment as a judgment against the city.

and it was charged against the corporate purposes fund. Inasmuch as there had been no direct appropriation for the payment of this judgment, it was paid from corporate fund moneys borrowed for this specific purpose on tax warrants and entry was made in the books of the city comptroller reducing the corporate purposes fund cash, and at the same time reducing the amount of judgments outstanding correspondingly. Before the comptroller paid the back salaries to the policemen and firemen, the corporation counsel of Chicago addressed a letter to the comptroller, in which he advised him, after referring to section 2-a and section 3 of Article VII of the Cities and Villages Act: "The foregoing provisions of the statute give express authority to the City Council to borrow a sufficient amount for payment of the salaries in question. Under the provisions of Section 3 above quoted it would be lawful for the City Council to borrow the money from any source outside of the funds of the City to be repaid before the close of the fiscal year 1939, but, since the City has no borrowing capacity under the constitutional debt limitation, the City Council may authorize the City Comptroller and the City Treasurer to loan or advance the necessary amount to pay the salaries ordered paid by court from any funds of the City not immediately necessary for the purpose for which the same were appropriated and to provide in the annual appropriation bill for the year 1939 a sufficient amount in the appropriations for salaries to reimburse the funds from which the temporary loans were made." (Italics ours.)

It is conceded that the sum of \$261,314.50 was not used to pay any of the judgments for which the appropriations and levies had been made, except for approximately \$40,000, and it is argued that this money was used toward the payment of \$600,000 made to policemen and firemen under compulsion of an order entered in a mandamus proceeding brought by the retired policemen and firemen, entitled "Malloy et al. v. City of Chicago et al." As is heretofore pointed out, the order for the writ of mandamus in that

and it was charged against the corporate purposes fund. Inasmuch as there had been no direct appropriation for the payment of this judgment, it was paid from corporate fund money borrowed for this specific purpose on tax warrants and entry was made in the books of the city comptroller reducing the corporate purposes fund cash, and at the same time reducing the amount of judgments outstanding correspondingly. Before the comptroller paid the back salaries to the policemen and firemen, the corporation counsel of Chicago addressed a letter to the comptroller, in which he advised him, after referring to section 2-a and section 3 of Article VII of the Illinois and Illinois Act: "The foregoing provisions of the statute give no authority to the City Council to borrow a certain amount for payment of the salaries in question. Under the provisions of section 3 above quoted it would be lawful for the City Council to borrow the money from any source outside of the funds of the City to be repaid before the close of the fiscal year 1907, but, since the City has no borrowing capacity under the constitutional limitation, the City Council may authorize the City Comptroller and the City Treasurer to loan or advance the necessary amount to pay the salaries ordered paid by court from any funds of the City not immediately necessary for the purpose for which the same were appropriated and so provide in the annual appropriation bill for the year 1907 a sufficient amount in the appropriation for salaries to reimburse the funds from which the temporary loans were made." (Italics ours.)

It is contended that the sum of \$501,114.30 was not used to pay any of the judgments for which the appropriation and loan had been made, except for approximately \$40,000, and it is argued that this money was used toward the payment of \$600,000 made to policemen and firemen under compulsion of an order entered in a judgment procured by the retired policemen and firemen, entitled "Malloy et al. v. City of Chicago et al." As is heretofore pointed out, the order for the writ of mandamus in that

proceeding does not direct the city to pay the sum of \$600,000 out of the judgment fund for which appropriations had been made for the years 1936 to 1938, inclusive, and obviously the court could not order a municipality to pay moneys out of funds which had been appropriated for one purpose to satisfy obligations for another purpose. (Chicago v. People, 210 Ill. 84, 93.) The corporation counsel evidently recognized this rule of law, since his letter to the comptroller does not recommend or authorize the use of the \$261,314.50 which had been appropriated and levied for judgments, for the payment of salaries ordered to be paid to the policemen and firemen, but he simply recommended a temporary loan from the funds of the city "not immediately necessary for the purposes for which the same were appropriated." However, the sum of \$261,314.50 was immediately necessary only for the payment of those judgments which had been entered prior to 1938. Relator's judgment was entered in 1936. Therefore, the fund which had been appropriated was available for the payment of this judgment, which had a prior right to payment over that of salaries of retired policemen and firemen, and we think the City of Chicago did not have the right to the prejudice of relator to charge the \$600,000 payment against the judgment appropriation.

Respondents cite numerous cases tending to support the contention that the city had no moneys available for the payment of petitioner's judgment, and that a lack of funds is a complete defense to a petition for mandamus. The recent case of DeWolf v. Bowley, 355 Ill. 530, is cited. In that case the trial court awarded a writ of mandamus directing the county clerk of Boone county to issue warrants upon the treasurer of that county. The defendants' answer averred that there was no money available from an appropriation for the purpose. Petitioner demurred to this answer, and the demurrer

proceeding does not direct the city to pay the sum of \$600,000 out of the judgment fund for which appropriations had been made for the years 1936 to 1938, inclusive, and obviously the court could not order a municipality to pay moneys out of funds which had been appropriated for one purpose to satisfy obligations for another purpose. (*Chicago v. People*, 210 Ill. 84, 93.) The corporation counsel evidently recognized this rule of law, since his letter to the comptroller does not recommend or authorize the use of the \$261,314.50 which had been appropriated and levied for judgments, for the payment of salaries ordered to be paid to the policemen and firemen, but he simply recommended a temporary loan from the funds of the city "not immediately necessary for the purposes for which the same were appropriated." However, the sum of \$261,314.50 was immediately necessary only for the payment of those judgments which had been entered prior to 1938. Relator's judgment was entered in 1940. Therefore, the fund which had been appropriated was available for the payment of this judgment, which had a prior right to payment over that of salaries of retired policemen and firemen, and we think the City of Chicago did not have the right to the prejudice of relator to charge the \$600,000 payment against the judgment appropriation.

Respondents cite numerous cases tending to support the contention that the city had no moneys available for the payment of petitioner's judgment, and that a lack of funds is a complete defense to a petition for mandamus. The present case of *People v. Relator*, 352 Ill. 530, is cited. In that case the trial court awarded a writ of mandamus directing the county clerk of Boone county to issue warrants upon the treasurer of that county. The defendants' answer averred that there was no money available from an appropriation for the purpose. Petitioner demurred to this answer, and the demurrer

was overruled. Nevertheless, the trial court, without hearing any evidence, entered a finding for the petitioner. The Supreme court reversed the judgment as erroneous because the answer had raised an issue of fact, and indicated that evidence should have been heard to show the answer to be untrue before entering judgment for the petitioner. In the instant case a full hearing was had on respondents' answer of no funds, and the court after hearing all the testimony found that there were funds available for the payment of the judgment.

In Board of Supervisors v. People, 222 Ill. 9, a demurrer was filed to respondents' answer which alleged that no money was available in the municipal treasury. There was no prior judgment against the county and the Supreme court simply stated that to justify a court in awarding a writ of mandamus involving an expenditure of money it must appear that the necessary funds are on hand or otherwise under the control of the defendant. The relator in the case at bar met this requirement upon the trial by competent evidence.

A number of other cases cited by respondents holding that a municipality cannot be compelled by mandamus to pay money out of a fund when no appropriations for that fund have been made, or where the appropriation has been legally exhausted, were decided on the pleadings, without taking any evidence, and without reviewing these cases in detail it may be stated generally that from the pleadings it did not appear that the necessary preliminary steps to the payment of relator's judgment had been shown. In a number of the cases no issue of fact was presented and in some instances the petitions sought to compel an appropriation and levy where no antecedent appropriation and levy had been made and the money collected, as was done in the case at bar. The policy of this state is well stated in the recent case of People v. Kelly, 367 Ill. 616: "A city and its officers can have no higher duty than the payment of an honest debt reduced to judgment, and it is not discretionary with its officers whether or not they shall do so.

was overruled. Nevertheless, the trial court, without hearing any evidence, entered a finding for the petitioner. The Supreme court reversed the judgment as erroneous because the answer had raised an issue of fact, and indicated that evidence should have been heard to show the answer to be untrue before entering judgment for the petitioner. In the instant case a full hearing was had on respondents' answer of no funds, and the court after hearing all the testimony found that there were funds available for the payment of the judgment.

In Board of Supervisors v. People, 222 Ill. 9, a demurrer

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A number of other cases cited by respondents holding that a municipality cannot be compelled by mandamus to pay money out of a fund when no appropriation for that fund has been made, or where the expenditure has been lawfully expended, were decided on the pleadings, without taking any evidence, and without reviewing these cases in detail it may be stated generally that from the pleadings it did not appear that the necessary preliminary steps to the payment of relator's judgment had been shown. In a number of the cases no issue of fact was presented and in some instances the petitions sought to compel an appropriation and levy where no antecedent appropriation and levy had been made and the money collected, as was done in the case at bar. The policy of this state is well stated in the recent case of People v. Kelly, 367 Ill. 616: "A city and its officers can have no higher duty than the payment of an honest debt reduced to judgment, and it is not discretionary with its officers whether or not they shall do so."

If the payment of this judgment, or any part of it, would necessarily place the officers of the city in a position to prevent them from carrying on the essential functions of government, that fact should have been shown by proof. (People v. Rice, 356 Ill. 373)."

The remaining point urged by respondents is that the action must fail because the record shows that relator's judgment is not next in the order of payment, as is required under an amendment to the Judgment Tax Act (paragraph 697a, p. 544, chap. 24, Ill. Rev. Stats. 1939). The amendment seems to have been enacted as a limitation upon the ministerial powers of city officials, in an effort to prevent them from voluntarily making preferential payments on judgments. This is indicated in People v. Kelly, 361 Ill. 54, in which the court said (p. 59) that it was "unnecessary to discuss any possible effect of the amendment to the Judgment Tax act or any provisions of the ordinances of the City of Chicago concerning the order of payment of judgments," since no question of priority was involved. The court said that "there is admittedly more money in the judgment fund of the city than is required to pay the claim involved and there is no evidence of any other judgment creditor making claim on that fund. So far as this record shows, all other creditors may be acquiescent and satisfied with the receipt of interest payments such as were shown to have been made to the appellant here." Likewise, in the instant case there is no evidence that any other judgment creditor is seeking payment of his judgment, aside from one who filed a mandamus suit subsequent to the institution of this proceeding for the collection of \$18,000. It is pointed out in relator's brief and argument that the comptroller may send a notice by registered mail to the judgment creditor that his claim is ready for payment, and if he fails to present his claim for payment within fifteen days, then judgments next in order of entry shall be paid. The record here is silent as to whether or not such notice was sent to any or all judgment creditors whose judgments

notice was sent to any or all judgment creditors whose judgments
 payment within fifteen days, then judgments next in order of entry
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 creditor making claim on that fund. So far as this record shows,
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 Ill. 54, in which the court said (p. 39) that it was "unnecessary
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 as a limitation upon the ministerial powers of city officials, in
 Ill. Rev. Stat., 1937). The amendment seems to have been enacted
 ment to the Judgment Tax Act (paragraph 0972, p. 344, chap. 34,
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 action must fail because the record shows that relator's judgment
 The remaining point urged by respondents is that the
 373)."

fact should have been shown by proof. (People v. Rice, 350 Ill.
 them from carrying on the essential functions of government, that
 easily place the officers of the city in a position to prevent
 If the payment of this judgment, or any part of it, would neces-

were entered between January 1, 1935, and April 22, 1936, the date of the entry of judgment in question, and relator's counsel very appropriately say that they have no way of knowing the number and amount of notices for payment sent to the holders of judgments by the comptroller under the provisions of the ordinance.

The rule adopted by the Supreme court is that the person who actually wishes to collect his judgment and is diligent in enforcing collection thereof will be rewarded with a writ of mandamus provided there are available moneys in the city treasury and appropriations have been made therefor. (People v. Kelly, 367 Ill. 616; People v. Kelly, 367 Ill. 631.) The record in this proceeding indicates that the relator comes within that class, that it was diligent in enforcing collection of its judgment, and that since funds were available in the city treasury for which an appropriation had been made, it should be rewarded with a writ of mandamus. We think the writ was properly issued, and therefore the judgment of the Circuit court is affirmed.

JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.

were entered between January 1, 1935, and April 30, 1936, the date of the entry of judgment in question, and relation's counsel very appropriately say that they have no way of knowing the number and amount of notices for payment sent to the holders of judgments by the comptroller under the provisions of the ordinance.

The rule adopted by the Supreme Court is that the person

who actually wishes to collect his judgment and is diligent in enforcing collection thereof will be rewarded with a writ of mandamus provided there are available moneys in the city treasury and appropriations have been made therefor. (People v. Kelly, 307 Ill. 616; People v. Kelly, 307 Ill. 631.) The record in this proceeding indicates that the relation comes within that class, that it was diligent in enforcing collection of its judgment, and that since funds were available in the city treasury for which an appropriation had been made, it should be rewarded with a writ of mandamus. As with the writs properly issued, and therefore the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

Seaman and Sullivan, Jr., counsel.

In the Matter of the Estate of
VIRGIL M. BRAND, Deceased.

HORACE L. BRAND,

Appellant,

v.

ARMIN W. BRAND,

Appellee.

APPEAL FROM

CIRCUIT COURT,

JOHN COUNTY.

307 I.A. 668

MR. JUSTICE MCGURELY DELIVERED THE OPINION OF THE COURT.

This is a controversy between Horace L. Brand and Armin W. Brand, administrators of the estate of Virgil M. Brand, deceased, over their final account in this estate; the Probate court first heard the matter and entered an order; Horace Brand appealed to the Circuit court, which entered an order essentially like that of the Probate court, and Horace Brand appeals to this court.

Virgil M. Brand died intestate June, 1926; in July letters of administration were issued to Horace L. Brand and Armin W. Brand, the sole heirs at law and next of kin of their brother Virgil; differences arose early between the administrators; there was a delay in filing a final account in the estate, and July, 1935, Armin by petition in the Probate court had an order that Horace file a final report; this order contained a stipulation that the administrators would accept as final all the rulings of the Probate court on the final report, waive appeal, release errors and do nothing to set aside or interfere with the court's rulings.

Horace filed a final account in which he claimed credit for administrator's fees for himself of \$23,875, and for Armin, \$51,125; he also claimed credit of \$371.72 for an alleged overcharge for interest on an open account, also a credit of \$629.19 on the Anna L. Leddies claim. Mrs. Leddies is the daughter of Horace. He also claimed credit for \$500, said to be due H. L. Brand & Co.

Armin filed objections to the account as stated by Horace, with an audit of the estate prepared by Arthur Young & Co., public

In the Matter of the Estate of
WILLIAM A. HARRIS, deceased.

JOHN A. HARRIS,

vs.

WILLIAM A. HARRIS,

807 14.668

THE HARRIS ESTATE TRUST, INC. (as Trustee)

This is a controversy between William A. Harris and John A. Harris, administrators of the estate of William A. Harris, deceased, over their final account in this estate; the probate court filed their report and signed an order upon which appeal is now pending; the court, which entered an order essentially like that of the probate court, and hence found appeal to this court.

WILLIAM A. HARRIS, Trustee, Intervenor, vs. JOHN A. HARRIS, Intervenor. This is a controversy between William A. Harris and John A. Harris, administrators of the estate of William A. Harris, deceased, over their final account in this estate; the probate court filed their report and signed an order upon which appeal is now pending; the court, which entered an order essentially like that of the probate court, and hence found appeal to this court.

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WILLIAM A. HARRIS, Trustee, Intervenor, vs. JOHN A. HARRIS, Intervenor. This is a controversy between William A. Harris and John A. Harris, administrators of the estate of William A. Harris, deceased, over their final account in this estate; the probate court filed their report and signed an order upon which appeal is now pending; the court, which entered an order essentially like that of the probate court, and hence found appeal to this court.

accountants who were selected by both administrators for this purpose.

By agreement of the parties the Probate court stated the account. The court allowed Horace \$6000 more than he allowed Armin as administrator's fees. This apparently was on the basis of an alleged agreement in which Armin consented to this allowance. Otherwise the administrators would be entitled to equal compensation. The court disallowed the claim of Horace for credit on account of the Leddies claim but allowed him credit for \$500 due H. L. Brand & Co. The other controverted matters, including the accounting on so-called Roosevelt road property, the prorating of taxes and the division of some of the assets of the estate, were incorporated in the order by agreement of the parties. Horace, although stipulating that he would not appeal from the accounting made by the Probate court, appealed to the Circuit court, which stated the account virtually the same as in the Probate court but also allowed Armin attorney's fees for defending the appeal.

When letters of administration were issued to Horace and Armin, respectively, they agreed that Horace should manage the real estate left by Virgil, and Armin would handle the personal estate. They made all important decisions jointly. Virgil's estate was inventoried at \$972,596.99, and consisted of a large number of real estate mortgages, notes and accounts receivable, bonds, stocks, curios, jewelry and cash and an extraordinary collection of coins, medals and mementos.

Counsel for Horace in his brief questions the allowance of interest on an indebtedness of Horace to the estate, citing a number of cases holding that interest is not allowed on open accounts in the absence of any agreement to pay interest and before the indebtedness is due or demand made for payment. It may be conceded this is the law. The facts, however, show that when the two administrators

accounts who were advised by both administrators for this

purpose.

By agreement of the parties the Probate Court stated the account. The court allowed Horace \$1000 more than he allowed again as administrator's fees. This agreement was on the basis of an alleged agreement in which Arthur indicated to this agreement. When also the administrators would be entitled to equal compensation. The court allowed the claim of Horace for credit on account of the balance claim but allowed him credit for \$1000 and W. L. Bond \$ 10. The other controverted matters, including the accounting on so-called necessary used property, the possession of notes and the division of some of the assets of the estate, were incorporated in the order by agreement of the parties. Horace, although stipulating that he would not appeal from the accounting made by the Probate Court, appealed to the Circuit Court, which stated the account virtually the same as in the Probate Court but also allowed Arthur attorney's fees for defending the appeal.

When letters of administration were issued to Horace and Arthur, respectively, they agreed that Horace should manage the real estate, to wit: Virginia, and Arthur should manage the personal estate. They made all important decisions jointly. Virginia's estate was inventoried at \$75,500.00, and consisted of a large number of real estate mortgages, notes and accounts receivable, bonds, stocks, jewelry and cash and an extraordinarily collected of coins, medals and mementos.

Counsel for Horace in his brief questioned the allowance of interest on an indebtedness of Horace to the estate, citing a number of cases holding that interest is not allowed on open accounts in the absence of any agreement to pay interest and stating the interest was to be paid on the indebtedness for payment. It may be concluded that in the last, however, when that when the two administrators

conferred as to the open account of Horace with Virgil's estate, Horace submitted a statement of account to Arwin requesting that Arwin acknowledge by his signature that it was a true statement. After making a slight addition to the wording of the document Arwin signed it and made a copy for himself. This constituted an account stated between the parties. In this document which Horace himself made as stating his account with the estate of Virgil he admits that the item of \$871.73, charged as interest, is proper. In Kelly v. Federal Improvement Co., 182 Ill. App. 20, it was held that where the parties after full and fair opportunity for examination have adjusted and settled their mutual accounts, the law will not permit this settlement to be reopened except for clear evidence of fraud or mistake, and the burden of proof rests upon the party asserting it. See also The State v. I. O. R. Co., 246 Ill. 188, 241, and Dean & Son v. Conkey Co., 180 Ill. App. 182, and cases there cited. The court, in stating the account, properly charged interest on the open account of Horace Brand with the estate.

Counsel for Horace next questions the allowance of interest on the Mrs. Leddies claim. When Virgil died he was indebted to Arwin and Mrs. Leddies in amounts agreed upon by the administrators. Mrs. Leddies' claim against the estate was allowed for \$18,776.75. The order allowing this stated she had no other or further claim against the estate, and she never filed or asserted any other claim. Her claim was paid in full by January 13, 1938, but Horace continued to pay to his daughter, Mrs. Leddies, an amount totaling \$6870.80. This was done without the knowledge or approval of Arwin, and Horace agreed to repay this amount to the estate, together with interest thereon. He was properly charged with this amount by the Probate court. The overpayment to Mrs. Leddies was from estate funds. No relief is sought against her. Horace apparently now claims he is entitled to an additional credit of interest based upon these overpayments to Mrs. Leddies, but an agreement which is in evidence shows

...the account of ...
...submitted a statement of account to ...
...knowledge by his signature that it was a true statement. After
making a slight addition to the wording of the document which appears
it was made a copy for himself. This corrected account stated
whereas the original, it told ...
...his account with the estate of ...
...of \$671.75, charged as interest, is proper. In Kelly v. Federal
Investment Co., 108 Ill. App. 90, it was held that where the parties
...and the court with its comments on the evidence was ...
...their mutual accounts, the law will not permit this settlement
to be enforced where the check contained no cash or credit, and the
...also the
...upon the party asserting it. See also the
State v. A. E. N. Co., 208 Ill. 123, 241, and Kelly v. Federal
Co., 108 Ill. App. 123, and cases there cited. The court, in stating
the account properly charges interest on the sum advanced at ...
...with the estate.
...The ...
...the ...
...in ...
...allowed for \$15,776.75.
The order allowing said estate had no effect on other or further claim
against the estate, and she never filed or asserted any other claim.
Her claim was paid in full by January 13, 1932, but ...
to pay to his daughter, Mrs. Redden, an amount totaling \$1570.00.
This was done without the knowledge or approval of Lewis, and because
agreed to repay this amount to the estate, together with interest
thereon. He was properly charged with this amount by the Probate
court. The overpayment to Mrs. Redden was from estate funds. He
replied he sought against her. Because apparently now claimed he is
entitled to an additional credit of interest paid on the same ...

that Horace individually, and not in his representative capacity, agreed to repay this. There is nothing to indicate that this interest is to be paid out of the Virgil Brand estate. When Mrs. Zeddies' claim was allowed all details, including the amount, were fully known. It was a liquidated account. There was nothing in doubt as to the amount of the overpayment. The court properly denied Horace interest on the overpayments to Mrs. Zeddies.

It would unduly lengthen this opinion to go into all the evidence as to the items entering into the final account and the allowance of administrators' fees. Most of the matters have been agreed upon by stipulations. It was agreed that the so-called coin journals of the estate are to be photostated and divided; that the taxes on the Roosevelt road and Chicago avenue properties are to be prorated and the proceeds divided; Armin's account on the Roosevelt road property to be approved; an amount of \$1809.34, taxes on what is called the Roosevelt road and Washtenaw avenue properties, is to be charged against Horace personally. Horace was to be charged with the amount of the Zeddies overpayment and interest. The final order of the court was to be considered as the account of the co-administrators, the only question being as to the accuracy of the figures, and the method of setting forth the respective accounts, employed by the court, was acceptable to both parties. These stipulations are conclusive and binding upon both administrators and will be enforced so long as they are not unreasonable and against public policy. Plano Foundry Co. v. Industrial Comm., 356 Ill. 186, 190, and People ex rel. Stead v. Spring Lake Drainage Dist., 235 Ill. 479, 492.

As a general rule co-administrators are entitled to equal compensation. Martin v. Central Trust Co., 327 Ill. 540, 537. Here the Probate court went into the character of the services rendered to the estate by the respective administrators and was evidently of the opinion that their compensation should be in equal amounts. The

court, however, found that Armin had agreed to accept \$6000 less in administrator's fees than Morace received and fixed the amount of the fees accordingly.

The court properly taxed the costs of the litigation against Morace. It was in evidence that he had pursued dilatory tactics for years and was responsible for virtually all the delay and expense in connection with the prolongation of the probate proceedings. Although he had stipulated not to appeal from the orders of the Probate court but to accept them, he disregarded the stipulation and appealed to the Circuit court. Although it is argued on his behalf that the Circuit court sustained his objections to many of the items found by the Probate court, an examination of the record does not support this. His counsel cite only four items in which it is claimed the Circuit court found differently from the findings of the Probate court. These amounts total about \$2000, but examination of each of them shows that even with respect to these items the Circuit court virtually found the same as did the Probate court.

This is a case for the application of the rule that where the litigation is carried on for the benefit of an administrator personally and not for the benefit of the estate, it is proper to tax the costs of the proceeding against him personally. Edwards v. Lang, 331 Ill. 449, 451-52, and Felsenthal v. Gline, 214 Ill. 121. It cannot be argued that this litigation was for the benefit of the estate. If Morace loses the estate loses, whereas if Armin should prevail it is for the benefit of the estate.

The trial court had before it evidence of the time occupied and work done by counsel for Armin in following this appeal. It can better determine the reasonableness of the fees than can a court of review. Martin v. Central Trust Co., 327 Ill. 822.

In the brief for Morace the power of the Probate court ^{and of the Circuit court} to examine into and determine the differences between the administrators

... however, found that the ...
 administrator's fees than those received and found the amount of
 the fees accordingly.

The court properly found the facts of the litigation against
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 court but to accept them, he disregarded the stipulation and appeared
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 circuit court sustained his objection to many of the items found by
 the probate court, an examination of the record does not support
 this. His counsel also found items in which it is claimed the
 circuit court found differently from the findings of the probate
 court. These amounts total about \$2000, an examination of each of
 them shows that even with respect to these items the circuit court
 virtually found the same as did the probate court.

This is a case for the application of the rule that where
 the litigation is carried on for the benefit of an administrator
 personally and not for the benefit of the estate, it is proper to
 tax the costs of the proceeding against him personally. Ward v.
Ward, 111 Ill. 441, 442-443, and Ward v. Ward, 111 Ill. 441.
 It cannot be argued that this litigation was for the benefit of the
 estate. It would seem the estate would, under the facts, be
 benefited if it for the benefit of the estate.

The trial court had before it evidence of the time occupied
 and work done by counsel for estate in following this appeal. It was
 better determining the reasonableness of the fees than was a court of
 review. Ward v. Ward, 111 Ill. 441, 442-443.
 and of the circuit court
 In the first two cases the court of the probate court
 sustained the findings and determining the difference between the administrator's

is questioned. To this it may be said that both of the administrators stipulated to submit to the court all questions arising out of the administration of the estate. Moreover, it is the law that in a situation of this sort the court will proceed substantially as a court of equity to determine the rights of the parties. In Freno v. Estate of Cunningham, 267 Ill. 367, 374,ⁱⁿ an opinion by Mr. Justice Cartwright, it was said, "To avoid the delay, expense and embarrassment in the settlement of estates by requiring a resort, in the first place, to a court of equity, it will proceed in a case of an equitable character as though a bill in chancery has been filed, and will hear the evidence, investigate the claim and apply equitable rules in determining the judgment. (Moore v. Rogers, 19 Ill. 247; Dixon v. Snell, 21 id. 203; Heward v. Blagle, 52 id. 336; Wadsworth v. Connell, 104 id. 388; Thomson v. Black, 200 id. 465.) In such a case the court will act substantially as a court of equity, disregarding mere matters of form and looking to the substance to determine the equities of the parties."

Other points appearing in the brief for Morace Brand have been considered. We find nothing in the record which justifies a reversal.

The judgment of the Circuit court is affirmed.

JUDGMENT AFFIRMED.

O'Connor, P.J., and Hatchett, J., concur.

is questioned. To this it may be said that both of the administrative
 officials to whom the report was made were acting as of the
 administration of the estate. However, it is the law that in a
 situation of this sort the court will proceed substantially as a
 court of equity in determining the rights of the parties. In Irish v.
Irish of Connecticut, 207 N.H. 247, 274, ⁱⁿ an opinion by Mr. Justice
 Gossard, it was said, "To avoid the delay, expense and uncertainty
 which in the settlement of estates by proving a will, in the time
 taken for a court of equity, it will proceed in a case of an equitable
 character as though a will in question had been filed, and will hear
 the evidence, investigate the claim and apply equitable rules in
 determining the judgment." (See Irish v. Irish, 207 N.H. 247; Irish v.
Irish, 21 N.H. 207; Irish v. Irish, 22 N.H. 207; Irish v. Irish,
 23 N.H. 207; Irish v. Irish, 24 N.H. 207; Irish v. Irish, 25 N.H. 207;
 and will not substantially as a court of equity, investigating and
 settling of them and looking to the evidence in determining the
 rights of the parties."

When asked whether in the case the above facts have
 been considered, he thus replied in the record which follows a
 general answer.
 The judgment of the court is affirmed.
 JUDGMENT AFFIRMED.
 O'Connor, C.J., and Ketchum, J., concur.

40760

ROBERT L. SIMONS, for use of
NATIONAL BUILDERS BANK OF
CHICAGO,

Appellee,

v.

UNIVERSITY STATE BANK,

Appellant.

(Consolidated with No. 40759.)

APPEAL FROM CIRCUIT

COURT, COOK COUNTY.

307 I.A. 668²

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

This appeal by the University State Bank, garnishee, in the consolidated causes Nos. 40759 and 40760, raises but one point. It is contended that the court's power to amend the order of December 8, 1938, or to reinstate the judgment by confession of November 23, 1938, could not be exercised to the detriment of a third person who had acted upon the faith of the record, and that the garnishee had a right to rely on the record of December 8, 1938, and on the basis of that order to pay out the funds in its possession. It appears from the record that February 16, 1939, the day on which the trial court entered the order reaffirming the original judgment and entering judgment against the garnishee, counsel for the University State Bank called the court's attention to the fact that under its contract with Simons, made at the time the account was opened, it was provided that in the event of any garnishment affecting the account the bank should be entitled to compensation, and a request for the allowance of fees to the garnishee was made in open court. The court acceded to this request, and after a conference between the attorneys for plaintiff and the bank's counsel \$100 was agreed upon. This amount was allowed and a credit was taken by the bank to that extent. By this proceeding we think the bank is precluded from appealing from the order awarding plaintiff a judgment for \$1,414.19, instead of \$1,514.19, because under the well established rule a party who consents to the entry of an order, or accepts the benefits thereof, cannot appeal therefrom. (Boylan v. Boylan,

UNIVERSITY STATE BANK, CHICAGO, ILL., PLAINTIFF,
 vs.
 THE UNIVERSITY STATE BANK, CHICAGO, ILL., DEFENDANT.
 (Consolidated with No. 40751.)
 APPEAL FROM JUDGMENT
 COURT, COOK COUNTY,
 307 I.A. 688

MR. PRESIDING JUSTICE PRINCE DELIVERED THE OPINION OF THE COURT.

This appeal by the University State Bank, garnishee, in the consolidated causes Nos. 40759 and 40760, raises but one point. It is contended that the court's power to amend the order of December 8, 1938, or to reinstate the judgment by consolidation of November 23, 1938, could not be exercised to the detriment of a third person who had acted upon the faith of the record, and that the garnishee had a right to rely on the record of December 8, 1938, and on the basis of that order to pay out the funds in its possession. It appears from the record that February 16, 1939, the day on which the trial court entered the order reaffirming the original judgment and entering judgment against the garnishee, counsel for the University State Bank called the court's attention to the fact that under its contract with Simons, made at the time the account was opened, it was provided that in the event of any garnishment affecting the account the bank should be entitled to compensation, and a request for the allowance of fees to the garnishee was made in open court. The court acceded to this request, and after a conference between the attorneys for plaintiff and the bank's counsel \$100 was agreed upon. This amount was allowed and a credit was taken by the bank to that extent. By this proceeding we think the bank is precluded from appealing from the order awarding plaintiff a judgment for \$1,414.19, instead of \$1,314.19, because under the will established rule a party who consents to the entry of an order, or accepts the benefits thereof, cannot appeal therefrom. (Hoyan v. Hoyan,

349 Ill. 471, 473; Reardon v. Youngquist, 189 Ill. App. 3, 13; American Radiator Co. v. Walker, 276 Ill. App. 150, 248.) Furthermore, the contention of the bank that it had a right to rely on the record as of December 8, 1938, and on that basis to pay out the funds in its possession is not borne out by the facts. The bank actually refused to pay out the funds garnisheed until Simons had deposited government bonds for \$2,000 as security. The bank was not injured, and is in no position to complain of the order entered.

All that we said in cause No. 40759 with reference to the validity of the judgment upon which the garnishment was based is alike applicable to this proceeding. Therefore the judgment in garnishment against the University State Bank should be affirmed. It is so ordered.

JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.

was not informed, and is in no position to complain of the order had deposited government bonds for \$2,000 as security. The bank actually refused to pay out the funds demanded until Simons the funds in its possession is not borne out by the facts. The record as of December 8, 1932, and on that basis to pay out more, the contention of the bank that it had a right to rely on

the validity of the judgment upon which the garnishment was based is also applicable to this proceeding. Therefore the judgment in garnishment against the University of Texas should be affirmed.

ОБЩЕСТВО ТОВАРИЩЕВ

THE UNIVERSITY OF CHICAGO

41186

ANNIE C. OLSEN,
Appellant,

v.

EVANSTON BUS COMPANY,
a corporation,
Appellee.

APPEAL FROM MUNICIPAL COURT,

EVANSTON, ILLINOIS.

307 1.A. 669

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff sued in tort for damages arising out of an injury she received while a passenger on a bus operated by defendant. At the close of plaintiff's evidence the court allowed defendant's motion for a directed verdict in its favor and entered judgment accordingly. Plaintiff appeals.

The injury occurred on the afternoon of January 26, 1939, in Evanston, Illinois. Plaintiff, then 65 years of age, boarded one of defendant's buses at the northwest corner of Dempster street and Chicago avenue, in Evanston, Illinois. The bus was operated by Raymond E. White, who sat in a seat in the front end and acted as motorman and conductor. While the bus was standing still plaintiff entered the door, handed White a one dollar bill for which she received some change and tokens, and after depositing one of the tokens in a coin box at the right of the operator in the front of the bus, she faced toward the rear to look for a seat. The door of the bus was closed by White after she entered. The bus had an aisle running toward the back. Immediately to the rear of the operator on each side of this aisle were two seats facing each other which ordinarily afford room for three persons. Toward the back there are seats on each side of the aisle facing the front of the bus. All the seats were occupied with the exception of one or two on the front side seat on the west (or left) side of the bus, just back of the operator. There is considerable conflict in the evidence as to what ensued.

Plaintiff testified that she was about to take the only

11-11-39

WILLIAM C. O'NEAL

Attorney

EVANSTON BUS COMPANY

a corporation

Attorneys

OFFICE OF THE JUDGE

EVANSTON, ILLINOIS

307 1/2 A. 669

MR. PRESIDING JUSTICE WYND DELIVERED THE OPINION OF THE COURT.

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each side of the aisle facing the front of the bus. All the seats

were occupied with the exception of one or two on the front side seat

on the west (or left) side of the bus, just back of the operator.

There is considerable conflict in the evidence as to what occurred.

Plaintiff testified that she was about to take the only

vacant seat available when the bus started. Her counsel then propounded this question and she answered as follows: "Q. Did you get seated in that seat? A. No, I didn't get seated because the bus started up and jerked and threw me." Mr. Lister, counsel for defendant, objected to the answer as being a conclusion, and suggested that the jury should determine whether there was a jerk from her description. The witness then added: "Call it a bounce then. It was a bounce more than a jerk. It bounced up. Q. Describe this motion which you say is a jerk, as near as you recall. A. Well, I was just going to seat myself in the car, when the car moved up, bounced up in the front, and it threw my head foremost against the heater and I lay prostrate, there. Q. Do you know where the car was when that happened? A. I thought it hadn't gone very far from Dempster street. That is the best of my memory."

On cross-examination she repeated this testimony in substance as follows: "There was space for two more passengers, on the same seat. When I saw that situation, I turned around to sit down and just as I did so the bus started up with a jerk. The bus had been standing still at the time. That was my impression from the jerk it gave. I couldn't say definitely that the bus had not moved while I was getting my change, because I wasn't paying very much attention, only getting my change and my seat." In the course of the cross-examination she also said: "It is not possible that I might have fallen from the ordinary motion of the bus. I couldn't have fallen. I have traveled too long and I never had trouble, and I have traveled them a lot of times since."

The operator of the bus, Raymond E. White, was called as a witness by plaintiff for cross-examination under the statute. The court, however, refused to allow him to be cross-examined under the statute, and plaintiff's counsel thereupon examined him as plaintiff's witness. He presented an entirely different version of the occurrence, and said that the bus had traveled substantially a block from Dempster street to Hamilton street on Chicago avenue, and was

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tiff's witness. He presented an entirely different version of the
occurrence, and said that the bus had traveled substantially a block
from Dempster street to Hamilton street on Chicago avenue, and was

about to come to a stop along the curb when he noticed plaintiff lying on the floor beside him with her head toward the front of the bus. He had not observed her after she paid her fare and walked toward the rear of the bus in search of a seat, and did not know how far she had proceeded. He testified that after she paid her fare he "got the car moving in the middle of the block, about fifteen miles an hour, and as he approached Hamilton street to make a stop he passed through some snow along the curb and gradually brought the car to a stop. He did not notice plaintiff as he was pulling over to the curb, but about fifteen feet before the bus stopped he observed her head on the floor of the bus alongside of him. He testified that as he ran into the snow next to the curb, "the bus made a very slight movement," which the witness was unable to describe further, but he said definitely that this "movement," which he was unable to describe or account for, took place just before the bus came to a stop and just before he noticed plaintiff lying on the floor of the bus beside him.

Plaintiff's complaint contained a general allegation of negligence, and it was also averred that plaintiff was in the exercise of ordinary care for her own safety. Her evidence on the latter proposition was clear. She testified that she had taken hold of the stanchion or bar in the bus as she paid her fare and then proceeded slowly toward the rear in search of a seat. There is nothing in the evidence to indicate that she was not at all times preceding the accident in the exercise of due care for her own safety. The court, however, was of opinion that there was no evidence to support the charge that defendant had been negligent in the operation of the bus, and therefore directed a verdict. We think this was error. The rule is well settled by a long line of decisions in this state that the court may not weigh or disregard the testimony of plaintiff or any of her witnesses in passing upon a motion to direct a verdict, but must allow the case to go to the jury if the proof most favorable to plaintiff tends to support her complaint. (Libby, McNeill &

about to come to a stop along the curb when he noticed plaintiff lying on the floor beside him with her head toward the front of the bus. He had not observed her after she paid her fare and walked toward the rear of the bus in search of a seat, and did not know how far she had proceeded. He testified that after she paid her fare he "got the car moving in the middle of the block, about fifteen miles an hour, and as he approached Hamilton street to make a stop he passed through some snow along the curb and gradually brought the car to a stop. He did not notice plaintiff as he was pulling over to the curb, but about fifteen feet before the bus stopped he observed her head on the floor of the bus alongside of him. He testified that as he ran into the snow next to the curb, "the bus made a very slight movement," which the witness was unable to describe further, but he said definitely that this "movement," which he was unable to describe or account for, took place just before the bus came to a stop and just before he noticed plaintiff lying on the floor of the bus beside him.

Plaintiff's complaint contained a general allegation of negligence, and it was also averred that plaintiff was in the exercise of ordinary care for her own safety. Her testimony on the latter proposition was clear. She testified that she had taken hold of the station or bar in the bus as she paid her fare and then proceeded slowly toward the rear in search of a seat. There is nothing in the evidence to indicate that she was not at all times proceeding the accident in the exercise of due care for her own safety. The court, however, was of opinion that there was no evidence to support the charge that defendant had been negligent in the operation of the bus, and therefore directed a verdict. We think this was error. The rule is well settled by a long line of decisions in this state that the court may not weigh or disregard the testimony of plaintiff or any of her witnesses in passing upon a motion to direct a verdict, but must allow the case to go to the jury if the proof most favorable to plaintiff tends to support her complaint. (Lippy, McNeill &

Libby v. Cook, 222 Ill. 206; Pronskevitch v. C. & A. Ry. Co., 232 Ill. 136; Reiter v. Standard Scale Co., 237 Ill. 374.)

Plaintiff's testimony indicated that the bus jerked or bounced just about as she was to take her seat, and the operator of the bus testified to the slight movement of the bus just before plaintiff was thrown to the floor. Whether it happened at Dempster street or later and the manner in which it occurred as affecting defendant's liability were questions of fact for the jury to determine, but under the well established rule there was evidence for the jury's consideration and the court was not justified in directing a verdict for defendant, thus invading the province of the jury in passing upon the evidence. The rule is well set forth in the recent case of Russell v. Richardson et al., 302 Ill. App. 589, where, as here, the accident resulted from a sudden jerk of the car. The court there said (p. 592): "The rule is that negligence and contributory negligence are questions of fact for the jury. If the matter is open to a difference of opinion, the jury must pass upon it."

Plaintiff's counsel complain of the ruling of the court in refusing to permit the cross-examination of White under the statute. If plaintiff wished to bring White within the rule she could have joined him as a defendant and thus she would have been entitled to cross-examine him under the statute.

Since the cause will have to be retried, we refrain from any extensive comment on the evidence except in so far as is necessary to determine the principle question in issue. The judgment of the Municipal court of Evanston is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

Scanlan and Sullivan, JJ., concur.

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111. 724. Wright v. Board of Health, 111 Ill. 302.

111. 724. Wright v. Board of Health, 111 Ill. 302.

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the jury's consideration and the court was not justified in directing

a verdict for defendant, thus invading the province of the jury in

passing upon the evidence. The rule is well set forth in the recent

case of Wright v. Board of Health, 111 Ill. 302, 111 Ill. App. 399, where, as

here, the accident resulted from a sudden jerk of the car. The court

there said (p. 392): "The rule is that negligence and contributory

negligence are questions of fact for the jury. If the matter is open

to a difference of opinion, the jury must pass upon it."

Plaintiff's counsel complain of the ruling of the court in

refusing to permit the cross-examination of White under the statute.

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any extensive comment on the evidence except in so far as is necessary

to determine the principal question in issue. The judgment of the

Illinois court of Evanston is reversed and the case is remanded

for a new trial.

REVEREND JUSTICE OF THE SUPREME COURT

Scamman and Sullivan, JJ., concur.

41206

MARY MACIEJEWSKI,
Appellee,

v.

GUY A. RICHARDSON and WALTER
J. CUMMINGS, as receivers, etc.,
et al., doing business as
CHICAGO SURFACE LINES,
Appellants.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

307 I.A. 669²

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff sued to recover damages for injuries alleged to have been sustained by her when she fell from a street car owned and operated by defendants. The jury returned a verdict finding defendants guilty and assessing plaintiff's damages at \$7,500 on which judgment was entered. Defendants appeal.

The accident occurred in the early afternoon of June 25, 1936. Plaintiff was a passenger in a southbound Ashland avenue pay-as-you-enter street car, owned and operated by defendants. In alighting from the car at 48th street she was thrown to the pavement and severely injured. The testimony of the witnesses for the respective parties and the theories with respect to the manner in which the accident occurred are sharply conflicting. It was plaintiff's contention that as the car was approaching 48th street she indicated her desire to alight by pushing the signal button and then arose from her seat and walked to the rear exit door which leads from the body of the street car to the rear platform; that the car stopped as she reached the door; that she stepped out on the rear platform, took hold of the center handrail with her right hand, and was putting her right foot down on the step when the street car started forward, causing her to fall. Defendants proceeded upon the theory that the street car stopped at the safety island on the north side of 48th street, the regular stopping place, where two passengers boarded the car at the rear platform and one alighted from the front; that when

[illegible]

903 A. 1702

to have been sustained by her when she fell from a street car owned and operated by defendants. The jury returned a verdict finding defendants guilty and assessing plaintiff's damages at \$7,500 on which judgment was entered. Plaintiff appeals.

25, 1936. Plaintiff was a passenger in a southbound Ashland Avenue pay-as-you-enter street car, owned and operated by defendants. In alighting from the car at 48th Street she was thrown to the pavement and severely injured. The testimony of the witnesses for the de-

car at the rear platform and one alighted from the front that when street, the regular stopping place, where two passengers boarded the street car stopped at the safety island on the north side of 48th causing her to fall. Defendants proceeded upon the theory that the her right foot down on the step when the street car started forward, took hold of the center handrail with her right hand, and was puttin as she reached the door; that she stepped out on the rear platform, the body of the street car to the rear platform, and the car stopped nose from her seat and walked to the rear exit door which leads to indicated her desire to alight by pushing the signal button and then Cliff's contention that as the car was approaching 48th street she

the car then started forward plaintiff was not alighting nor was she on the rear platform ready to alight, but that as the car moved forward and after it had gone about a car length, plaintiff hurried out of the body of the car onto the rear platform, and while the car was in motion fell off to the street onto the pavement at or near the north cross walk of 48th street.

It is first urged by defendants that the verdict is against the manifest weight of the evidence. Several witnesses testified for plaintiff, and a greater number for defendant, and their evidence is so conflicting as to be irreconcilable. We have carefully read the record and find that at least two of plaintiff's witnesses corroborated her testimony and theory of the case. Defendants' witnesses, including the conductor, gave an entirely different version of the occurrence. It is not argued by defendants, and indeed it could not well be argued, that plaintiff failed to adduce evidence supporting her complaint and her theory of the case. The most that can be said is that there was considerable variance between the testimony adduced by plaintiff's witnesses and those who testified for defendants. This presented a question of fact for the jury. Plaintiff contends, of course, that an analysis of the evidence adduced upon the hearing indicates that it clearly preponderates in her favor, without taking into consideration her own testimony. Defendants on the other hand argue that, viewed in the light of established physical facts, the record shows that plaintiff was not alighting from the street car while it was standing, which is the basis upon which she rests her case, and therefore they say that the verdict was against the manifest weight of the evidence. However, all the evidence before the jury indicated the conflict in the testimony of the various witnesses and of the respective theories of the parties, and it was the duty of the jury who had an opportunity to hear and view the witnesses and determine their credibility, to determine the facts from the evidence. The general rule of law applicable to circumstances of this kind is too well established

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to require extensive citations, and is well set forth in Kapella v. Chicago Railways Co., 228 Ill. App. 528, wherein the court, quoting from an opinion of the Supreme Court of Illinois, said (p. 536): "It can scarcely be repeated too often, that the judge and jury who try a case in the court below have vastly superior advantages for the ascertainment of truth and the detection of falsehood over this court (the Supreme court) sitting as a court of review." A reviewing court is not justified in invading the province of the jury in determining the facts, even though there be a sharp conflict in the evidence.

The principal ground for reversal, and the only one presented to the court on oral argument, is that the jury was improperly charged. The main criticism is leveled at plaintiff's given instruction No. 19, which reads: "19. It is the duty of common carriers to do all that human care, vigilance and foresight can reasonably do, under the circumstances and in view of the character and the mode of conveyance adopted, and consistent with the practical prosecution of their business, reasonably to guard against accidents and consequential injuries to their passengers, and if they neglect so to do they are to be held strictly responsible for all consequences which follow from such neglect; while the carrier is not an insurer for the absolute safety of the passengers, it does, however, in legal contemplation, undertake to exercise the highest degree of care consistent with the practical operation of its business and the mode of conveyance adopted, to secure the safety of the passengers, and is responsible for the slightest neglect, resulting in injury to the passenger, if the passenger is, at and before the time of the injury, exercising ordinary care for her own safety." (Italics ours.) Defendants do not complain of the first part of the instruction, but they criticize the second part thereof, which charges the jury that the carrier "is responsible for the slightest neglect," resulting in injury to the passenger. It is conceded, of course, that common carriers are not insurers,

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first part of the instruction, but they criticize the second part
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It is conceded, of course, that common carriers are not insurers,

but are charged with the highest degree of care consistent with the practical operation of their business and the mode of conveyance adopted to secure the safety of passengers. It is argued, however, that by telling the jury that the carrier is responsible for the slightest neglect, the instruction not only unduly extended the application of the highest degree of care rule, but also correspondingly minimized and impaired the noninsurer rule, which is a limitation upon the rule of highest degree of practical care. Similar arguments were made in cases where the instruction was approved and the Supreme court of Illinois has on two occasions held that instructions given in the identical language with the one in the case at bar stated the law correctly. The first of these is Chicago & Alton R. R. Co. v. Byrum, 153 Ill. 131, where precisely the same instruction was given in a suit brought against a common carrier, including the language employed in the case before us, namely, "is responsible for the slightest neglect resulting in injury to the passenger." In commenting upon the instruction, the court said that it stated the law correctly and was properly given, citing several earlier Illinois decisions. Later, in Chicago City Railway Co. v. Shaw, 220 Ill. 532, the same instruction was given, and upon appeal it was charged that it constituted prejudicial error. However, the court disposed of the criticism made by the following brief comment: "The words in the instruction that are complained of are 'slightest negligence.' Practically the same instruction, with the same words complained of, was before this court in the case of Chicago & A. R. Co. v. Byrum, 153 Ill. 131, and cases cited on page 135, and the giving of the same was approved. We do not feel at liberty to overrule what was said in that case, and are of the opinion that the instruction stated the law correctly."

In 1923, this court, in the case of Sczuck v. Chicago Railways Co., 229 Ill. App. 325, had occasion to pass upon the propriety of an instruction containing precisely the same language,

but are charged with the highest degree of care consistent with the practical operation of their business and the mode of conveyance adopted to secure the safety of passengers. It is argued, however, that by telling the jury that the carrier is responsible for the slightest negligence, the instruction not only unduly extended the application of the highest degree of care rule, but also correspondingly minimized and injured the maintenance rule, which is a limitation upon the rule of highest degree of practical care. Similar arguments were made in cases where the instruction was approved and the Supreme court of Illinois has on two occasions held that instructions given in the identical language with the one in the case at bar stated the law correctly. The first of these is Illinois v. Chicago & North Western Ry. Co., 153 Ill. 131, where practically the same instruction was given in a suit brought against a common carrier, including the language employed in the case before us, namely, "is responsible for the slightest neglect resulting in injury to the passenger." In commenting upon the instruction, the court said that it stated the law correctly and was properly given, citing several earlier Illinois decisions. Later, in Illinois v. Chicago & North Western Ry. Co., 250 Ill. 732, the same instruction was given, and upon appeal it was charged that it constituted prejudicial error. However, the court dismissed the petition made by the following brief comments: "The words in the instruction that are complained of are 'slightest negligence.' Practically the same instruction, with the same words complained of, was before this court in the case of Illinois v. Chicago & North Western Ry. Co., 153 Ill. 131, and cases cited on page 132, and the giving of the same was approved. We do not feel at liberty to overrule what was said in that case, and one of the opinions that the instruction stated the law correctly."

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and after citing Chicago A. R. Co. v. Byrum and Chicago City Ry. Co. v. Shaw, concluded: "We think the instruction is not subject to the criticism made."

Our attention has been called to several appellate court decisions of more recent date where the instruction was criticized for the same reason now urged by defendants. (Webber v. Chicago City Ry. Co., 267 Ill. App. 605, General No. 35882; Otto v. Richardson, 274 Ill. App. 649, General No. 37026.) So far as we have been able to ascertain the Supreme court has never reversed or modified its views as to the validity of the instruction in question and we feel ourselves bound under the circumstances to adhere to the ruling of the Supreme court. (Waxenberg v. Brown, 299 Ill. App. 225, 234; Hibbard, Spencer Bartlett & Co. v. City of Chicago, 299 Ill. App. 614, 29 N. E. (2d) 625.)

Criticism is also made of plaintiff's given instruction No. 13, which reads: "The jury are instructed that, while the law permits the plaintiff in the case to testify in her own behalf the jury have no right to discredit her testimony from caprice or merely because she is the plaintiff." It is said that this instruction was calculated to minimize and neutralize the rule stated in instruction No. 14, wherein the jury was charged that in weighing the evidence of the plaintiff and in determining how much credence was to be given it, the jury had the right to take into consideration the fact that she was the plaintiff and that she was interested in the result of the suit, and that the giving of instruction No. 13 tended to confuse the jury as to how it should apply the rule. This instruction is not a mandatory one and was approved as correctly stating the law in Lauth v. Chicago Union Traction Co., 244 Ill. 244, wherein the defendants contended that it was misleading and confusing. The court there said, pertaining to an instruction reading, "'The jury have no right to discredit his [plaintiff's] testimony from caprice or merely because he is the plaintiff.' We think this instruction as modified correctly stated the law and there is no

error in the giving of it." Instructions Nos. 13 and 14 are different in that defendants' instruction No. 14 tells the jury that it may consider that she is plaintiff in determining the credence to be given to her testimony, whereas in instruction No. 13 it was told that the fact that she is plaintiff does not authorize the jury to discredit her testimony from caprice.

It is next urged that plaintiff's given instruction No. 25, which reads as follows, was improper: "You are instructed that the only care and caution for her own personal safety, in alighting from the car in question is such care as a reasonably prudent and cautious person would have exercised under the same conditions and circumstances, before and at the time of the alleged injury. She was not required to exercise extraordinary care or diligence." It is argued that this instruction assumes that plaintiff was alighting from the car before and at the time of the alleged injury, thus tending to indicate that the testimony of plaintiff and another witness was true, notwithstanding the countervailing testimony of several witnesses for defendants. This instruction is likewise not mandatory and we find that in Kapella v. Chicago Railways Co., 228 Ill. App. 528, where the same objection was made, the instruction was held by the reviewing court to be unobjectionable. Counsel for defendant there argued that the instruction as given constituted an assumption that plaintiff was injured while alighting from the car, the same contention that is here made. The court pointed out, however, that "if there is any possible ambiguity in this instruction, which we are inclined to doubt, it was cured by other instructions that were given, ***." In the case at bar it may be said with equal force that if there was any ambiguity in this instruction it was also cured by the giving of defendants' given instruction No. 23, which apprised the jury of the theory of the complaint with respect to the negligence of defendants, and charged the jury that plaintiff was limited to her right of recovery as alleged, and that unless she had proved the material

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some objection was made, the instruction was held by the reviewing court to be unobjectionable. Counsel for defendant there argued that the instruction as given constituted an assumption that plaintiff was injured while alighting from the car, the same contention that is here made. The court pointed out, however, that "if there is any possible ambiguity in this instruction, which we are inclined to doubt, it was cured by other instructions that were given, ***." In the case at bar it may be said with equal force that if there was any ambiguity in this instruction it was also cured by the giving of defendants' given instruction No. 23, which apprised the jury of the theory of the complaint with respect to the negligence of defendants, and charged the jury that plaintiff was limited to her right of recovery as alleged, and that unless she had proved the material

allegations of negligence she would not be entitled to recover against defendants.

The remaining ground urged for reversal is that the damages awarded are excessive, and that the court erred in the admission of evidence pertaining to the question of damages. It appears from the record that plaintiff was a **normal** healthy person before this event of the approximate age of 42 years, and was physically able and did all the necessary housework to maintain a home for four people. By reason of her fall she sustained a fracture of the skull, which rendered her unconscious for a considerable period of time and necessitated hospitalization on two different occasions. She was confined to bed for a period of about a year after the accident, during which time she was up occasionally but not for any appreciable length of time. Since the accident she has been unable to do any work around the house except for occasional cooking and has suffered from convulsions or seizures at frequent intervals. The accident occurred more than three years before the trial and these convulsions or seizures had continued up to the time of the hearing. She suffers from headaches and her health and physical condition have been impaired to the extent she cannot pursue her normal activities and has continuously remained under the care of a physician.

Defendants say that the amount awarded her would be warranted only where the evidence shows to a reasonable degree of certainty that the injuries are permanent, and they point out that the expert witness who testified in plaintiff's behalf was unable to give it as his unqualified opinion that the injury was permanent. An examination of the record with respect to this phase of the case indicates that the physician testifying, while indicating that he thought the injury would be permanent, was rather hesitant in expressing such an opinion unqualifiedly, but he did finally say that he thought the injury was permanent. From the nature of the case,

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a reputable physician would ordinarily hesitate in making the flat statement that an injury of this kind would be permanent, but the tenor of his testimony indicates that he was of that opinion. The contention that the court committed error in the admission of evidence relates to a hypothetical question propounded to Dr. Krol, who had been attending plaintiff from shortly after the injury until the time of the trial. The question propounded calls for an opinion as to whether the injury would be permanent. His answer was "my opinion is that it may be permanent," and after this was stricken, on the ground that it was of a speculative nature, plaintiff's counsel propounded the question: "Doctor, without dealing in any speculations can you give us your opinion as to whether it is or is not permanent in character? A. Permanent." The authorities cited by defendants do not hold that a doctor may not be asked his opinion as to the character of an injury, but that he may testify as to the character of an injury as disclosed by an X-ray film. (Dooley v. Chicago City Railway Co., 166 Ill. App. 312.) That procedure was followed in this case, and we do not think it constitutes reversible error.

Under all the circumstances, we do not consider the verdict of \$7,500 excessive.

We find no convincing reason for reversal and therefore the judgment of the Circuit court is affirmed.

JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.

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 of an injury as a matter of fact. (See Ill. App. 182). That procedure was followed in this
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JUDGMENT AFFIRMED.

Sanlan and Sullivan, JJ., concur.

40939

HARRY D. HODGES,
Appellee,

v.

CHARLES A. HULPHREYS,
Appellant.

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

307 I.A. 670

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued to recover damages on account of personal injuries he sustained and for damage to his automobile, as a result of a collision with defendant's automobile in the intersection of 83rd street and St. Lawrence avenue on December 26, 1936. The jury returned a verdict in favor of plaintiff and assessed his damages in the sum of \$1,500. Defendant appeals from a judgment entered upon the verdict.

This case seems to have been well tried, as none of the errors that are ordinarily raised in cases of this kind are here urged. Defendant makes no point as to the amount of the damages awarded. Defendant contends that "the trial court erred in refusing to instruct the jury to find the defendant not guilty at the close of all the evidence as requested by him," because "there is no evidence in the record tending to show that at and immediately prior to the happening of the accident and injuries in question, the plaintiff was in the exercise of due care for the safety of his person and property. On the contrary, the evidence shows that the plaintiff was guilty of negligence which caused or proximately contributed to cause the said injuries and property damages in question," and "there was no evidence of negligence in the operation of defendant's automobile." Defendant further contends that the trial court erred in overruling the motion of defendant for a new trial, because the verdict of the jury was against the manifest weight of the evidence. Upon the oral argument defendant's counsel admitted that his main point was that plaintiff's evidence failed to make out a prima facie case. He further admitted that his

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 v.
 CHARLES A. HODGES
 Defendant

307 I.A. 670

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 fusing to instruct the jury to find the defendant not guilty if
 the close of all the evidence as requested by him," because "there
 is no evidence in the record tending to show that at and immediately
 prior to the happening of the accident and injuries in question,
 the plaintiff was in the exercise of due care for the safety of
 his person and property. On the contrary, the evidence shows that
 the plaintiff was guilty of negligence which caused or proximately
 contributed to cause the said injuries and property damages in
 question," and "there was no evidence of negligence in the operation
 of defendant's automobile." Defendant further contends that the
 trial court erred in overruling the motion of defendant for a new
 trial, because the verdict of the jury was against the manifest
 weight of the evidence. Upon the oral argument defendant's counsel
 admitted that his main point was that plaintiff's evidence failed
 to make out a prima facie case. He further admitted that his

first contention was based upon the assumption that defendant's theory of the facts should be adopted by the court. In fact, in his brief he argues, in support of his first contention, that "the verdict of the jury in favor of the plaintiff is not supported by a preponderance of the evidence." This argument has no bearing upon the question as to whether the court erred in refusing to instruct the jury to find defendant not guilty at the close of all the evidence. We find no merit in the argument that there is no evidence tending to show that at and immediately prior to the happening of the accident plaintiff was in the exercise of due care for the safety of his person and property, nor do we find any merit in the further argument of defendant that there was no evidence of negligence in the operation of defendant's automobile. Plaintiff, a physician, testified that he left Burnside hospital, located near Langley avenue and 95th street, in his automobile, about noon time, to make a call on a patient living near 62d street and Kimbark avenue; that he traveled north on St. Lawrence avenue and as he approached 83d street he was traveling on the right hand side of the street about three or four feet east of the center of the street; that he had his automobile under complete control; that he brought his car to a stop about fifteen feet south of the south curbing on 83d street; that the view to the right and left of the intersection was clear. He further testified that he glanced to the right and to the left; that he saw no traffic approaching from the east, but that he saw a car (defendant's) that was then 200 or 250 feet west of the intersection and was approaching it; that the car was traveling in the middle of the street; that he then put his car in motion and proceeded to cross the intersection; that after he had traveled approximately thirty-five feet and had reached the center of the intersection he looked again to the west and saw the defendant's car only ^{or twelve} ~~ten~~ feet away bearing down upon him; that plaintiff's car was then in second speed and he immediately applied the gas in an effort to get out of the way; that he then heard a loud noise and

first contention was based upon the assumption that defendant's theory of the facts should be adopted by the court. In fact, in his brief he argues, in support of his first contention, that "the verdict of the jury in favor of the plaintiff is not supported by a preponderance of the evidence." This argument has no bearing upon the question as to whether the court erred in refusing to instruct the jury to find defendant not guilty at the close of all the evidence. We find no merit in the argument that there is no evidence tending to show that at and immediately prior to the happening of the accident plaintiff was in the exercise of due care for the safety of his person and property, nor do we find any merit in the further argument of defendant that there was no evidence of negligence in the operation of defendant's automobile. Plaintiff, a physician, testified that he left Burnside hospital, located near Langley avenue and 25th street, in his automobile, about noon time, to make a call on a patient living near 62d street and Kimbark avenue; that he traveled north on St. Lawrence avenue and as he approached 83d street he was traveling on the right hand side of the street about three or four feet east of the center of the street; that he had his automobile under complete control; that he brought his car to a stop about fifteen feet north of the south curbing on 83d street; that the view to the right and left of the intersection was clear. He further testified that he glanced to the right and to the left; that he saw no traffic approaching from the east, but that he saw a car (defendant's) that was then 200 or 250 feet west of the intersection and was approaching it; that the car was traveling in the middle of the street; that he then put his car in motion and proceeded to cross the intersection; that after he had traveled approximately thirty-five feet and had reached the center of the intersection he looked again to the west and saw the defendant's car only faintly ^{or twelve} feet away bearing down upon him; that plaintiff's car was then in second speed and he instinctively applied the car in an effort to get out of the way; that he then heard a loud noise and

that that was the last thing he remembered until he "was waking up on a strange emergency table in a hospital;" that defendant's car had traveled 250 feet while plaintiff's car had traveled thirty-five or forty feet. Photographs of the two automobiles introduced in evidence show that the plaintiff's car was struck on the left side, just back of the front fender, and that the frame of plaintiff's automobile was bent inwardly about fourteen inches. Defendant testified that after the accident he found that part of the front of his car was "smashed back in;" that the frame had been damaged; that "the whole body was wavy;" that his car "was damaged beyond repair." He further testified that he was traveling east on 83d street in the center lane; that the pavement was slippery and at the curb was full of water; that as he approached St. Lawrence avenue he was traveling about twenty-two to twenty-four miles an hour; that his car was equipped with an overdrive that becomes operative when the speed is in excess of thirty-five miles an hour and that the overdrive was not operative at the time of the accident; that he did not use the overdrive in the winter time (the accident occurred on December 26); that as he approached St. Lawrence avenue his car was in third speed; that after he got to the intersection he noticed plaintiff's car; that it was then a few feet south of the sidewalk line, if there had been one there; that he did not know how fast plaintiff was going at the time; that there were no curbs on St. Lawrence avenue south of 83d street at that time; that when he saw plaintiff's automobile it was traveling in a northerly direction in St. Lawrence avenue; that defendant was then on the sidewalk line and he continued to look over the intersection; that the two automobiles came together on the east part of the intersection; that plaintiff's car was then on the east side of St. Lawrence avenue and defendant was south of the center of 83d street; that when the two cars came together defendant applied his brakes and his car skidded, the back end swung ^{around} toward the north; that plaintiff's car sort of caromed off from the front of defendant's car and continued on north; that the front part of plaintiff's car went over the side--

that that was the last thing he remembered until he "was waking up on a strange emergency table in a hospital;" that defendant's car had traveled 250 feet while plaintiff's car had traveled thirty-five or forty feet. Photographs of the two automobiles introduced in evidence show that the plaintiff's car was struck on the left side, just back of the front fender, and that the frame of plaintiff's automobile was bent inwardly about fourteen inches. Defendant testified that after the accident he found that part of the front of his car was "crushed back in;" that the frame had been damaged; that "the whole body was wavy;" that his car "was damaged beyond repair." He further testified that he was traveling east on 83d street in the center lane; that the pavement was slippery and at the curb was full of water; that as he approached St. Lawrence avenue he was traveling about twenty-two to twenty-four miles an hour; that his car was equipped with an overdrive that became operative when the speed is in excess of thirty-five miles an hour and that the overdrive was not operative at the time of the accident; that he did not use the overdrive in the winter time (the accident occurred on December 26); that as he approached St. Lawrence avenue his car was in third speed; that after he got to the intersection he noticed plaintiff's car; that it was then a few feet south of the sidewalk line, if there had been one there; that he did not know how fast plaintiff was going at the time; that there were no curbs on St. Lawrence avenue south of 83d street at that time; that when he saw plaintiff's automobile it was traveling in a northerly direction in St. Lawrence avenue; that defendant was then on the sidewalk line and he continued to look over the intersection; that the two automobiles came together on the east part of the intersection; that plaintiff's car was then on the east side of St. Lawrence avenue and defendant was south of the center of 83d street; that when the two cars came together defendant applied his brakes and his car skidded, the back end swung toward the north; that plaintiff's car skidded, the front end swung toward the north and continued on north; that the front part of plaintiff's car went over the side-

walk on the northeast side of the street and over a retaining wall into a lawn, where it rested against a tree; that defendant was about fifteen feet from plaintiff's car when he applied his brakes; that he did not see plaintiff's car slacken or change speed; that after the collision defendant's car rested practically in the spot where the collision occurred; that the rear end of defendant's car had swung around and the car was facing southeast; that defendant got out of his car and went over to plaintiff's car and saw plaintiff slumped over against ^{the} window. Upon cross-examination defendant testified that when he first saw plaintiff's car he, defendant, was only a few feet away from the intersection; that at that time plaintiff's car was probably about ten or twelve feet south of the intersection; that defendant was then traveling about twenty to twenty-four miles an hour; that from the time that he first saw plaintiff's car to the time of the collision he, defendant, traveled approximately twenty-five feet; that "the left front of Dr. Hodges' car came in contact with my car;" that at the moment of the impact he did not know how fast plaintiff was traveling, but that he, defendant, "must have been traveling very slowly;" that at the time of the impact he, defendant, was traveling "maybe five miles an hour." Defendant further testified that he had stated to a person who called upon him that when he first noticed plaintiff the front end of his, defendant's, car was just east of the west curb line and that he saw plaintiff coming there; that he was familiar with the intersection. John C. Ingraham, called by plaintiff, testified that he reached the intersection right after the accident and saw plaintiff's car leaning upon a tree in the front yard of a residence at the northeast corner of the intersection; that defendant's automobile was facing west and "close to even with the St. Lawrence curb line, that is the east curb line, extended across 83rd Street;" that it had drizzled a bit that day but it was not raining or drizzling at the time of the accident; that 83d street is a four-lane highway and St. Lawrence avenue, an ordinary street about twenty-five feet wide; that there was no stop sign on St. Lawrence avenue as you approached 83d street from the south, but

walk on the northeast side of the street and over a retaining wall
into a lawn, where it rested against a tree; that defendant was
about fifteen feet from plaintiff's car when he applied his brakes;
that he did not see plaintiff's car shaken or change speed; that
after the collision defendant's car rested practically in the spot
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defendant was then traveling about twenty to twenty-four miles an
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time of the collision he, defendant, traveled approximately twenty-
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plaintiff, testified that he reached the intersection right after the
accident and saw plaintiff's car leaning upon a tree in the front yard
of a residence at the northeast corner of the intersection; that
defendant's automobile was facing west and "close to even with the
St. Lawrence curb line, that is the east curb line, extended across
the street;" that it had displayed a big blue sign on its rear
reading or displaying at the time of the accident; that 834 street
is a four-lane highway and St. Lawrence avenue, an ordinary street
about twenty-five feet wide; that there was no stop sign on St.
Lawrence avenue as you approached 834 street from the south, but

there was a light post or stop sign or something like that which had been knocked down on the south side of 83d street; that when plaintiff was first brought to the car of the witness he was unconscious but that he regained consciousness when about half way to the hospital at a point a couple of miles from the scene of the accident.

"A motion to instruct the jury to find for the defendant is in the nature of a demurrer to the evidence, and the rule is that the evidence so demurred to, in its aspect most favorable to the plaintiff, together with all reasonable inferences arising therefrom, must be taken most strongly in favor of the plaintiff. The evidence is not weighed, and all contradictory evidence or explanatory circumstances must be rejected. The question presented on such motion is whether there is any evidence fairly tending to prove the plaintiff's declaration. In reviewing the action of the court of which complaint is made we do not weigh the evidence, - we can look only at that which is favorable to appellant. Yess v. Yess, 255 Ill. 414; McCune v. Reynolds, 288 id. 188; Lloyd v. Rush, 273 id. 489." (Hunter v. Troup, 315 Ill. 293, 296, 297. See, also, Mahan v. Richardson, 284 Ill. App. 493, 495; Thomason v. Chicago Motor Coach Co., 292 Ill. App. 104, 110; Molever v. Curtiss Candy Co., 293 Ill. App. 586, 587.)

Applying the law bearing upon the motion to instruct the jury to find for the defendant to the evidence, it is obvious that there was evidence fairly tending to prove plaintiff's complaint. " * * * Before we can say, as a matter of law, that there was no negligence on the part of the defendant or that there was such contributory negligence on the part of the plaintiff as to defeat recovery, we must be able to say that all reasonable minds must agree that the defendant was not negligent in his acts or that the injury was the result of plaintiff's own negligence." (Petro v. Hines, 299 Ill. 236, 240. See, also, Pollard v. Broadway Central Hotel Corp., 353 Ill. 321, 322, 323.)" (Thomason v. Chicago Motor Coach Co., supra, p. 110.) The jury were fully warranted in finding

there was a light post or stop sign or something like that which had been knocked down on the south side of 83d street; that when plaintiff was first brought to the car of the witness he was unconscious but that he regained consciousness when about half way to the hospital at a point a couple of miles from the scene of the accident.

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Applying the law bearing upon the motion to instruct the jury to find for the defendant in the evidence, it is obvious that there was evidence fairly tending to prove plaintiff's complaint. " * * Before we can say, as a matter of law, that there was no negligence on the part of the defendant or that there was such contributory negligence on the part of the plaintiff as to defeat recovery, we must be able to say that all reasonable minds must agree that the defendant was not negligent in his acts or that the injury was the result of plaintiff's own negligence." (Fetno v. Hotel Gove, 325 Ill. 321, 322, 323; 1-5.) (Thomas v. This Relation, 293 Ill. 286, 287; also, Harlow v. Harlow, 271 Ill. 293; WV. 280.) The jury were fully warranted in finding

from the evidence that when plaintiff reached the intersection defendant's car was then 200 to 250 feet west of the intersection; that plaintiff exercised ordinary care as he approached the intersection and started to cross it; that plaintiff entered the intersection before defendant reached it; and that defendant, under the circumstances, was guilty of negligence in driving his automobile at a high rate of speed on a slippery asphalt pavement as he approached and entered the intersection. They were further justified in finding that defendant traveled between 200 and 250 feet while plaintiff was traveling approximately thirty-five feet. Defendant's evidence shows that although he applied his brakes at the curbing on the west side of St. Lawrence avenue, the speed of his car was so high that the impact when his car struck the left side of plaintiff's car not only badly damaged plaintiff's car but damaged defendant's car beyond repair, and plaintiff's automobile was driven, by the impact, into the yard on the northeast corner of the intersection. Plaintiff saw defendant approaching when the latter was between 200 and 250 feet away from the intersection, and the jury were fully warranted in assuming that defendant saw plaintiff as the latter approached and entered the intersection in ample time to reduce the high speed of his car and thus avoid the collision.

We find no merit in the contention of defendant that the judgment should be reversed because the verdict of the jury is against the manifest weight of the evidence. After a careful consideration of all of the evidence, including that bearing upon the condition of the two automobiles after the impact, we are satisfied that the jury were fully warranted in finding a verdict for plaintiff. Defendant also argues in his brief that the verdict of the jury is not supported by a preponderance of the evidence. The question of preponderance of the evidence does not arise in this court. We cannot disturb the finding of the jury unless it is clearly against the manifest weight of the evidence.

Defendant has had a fair trial and the judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

from the evidence that when plaintiff reached the intersection defendant's car was then 200 to 250 feet west of the intersection; that plaintiff exercised ordinary care as he approached the intersection and started to cross it; that plaintiff entered the intersection before defendant reached it; and that defendant, under the circumstances, was guilty of negligence in driving his automobile at a high rate of speed on a slippery asphalt pavement as he approached and entered the intersection. They were further justified in finding that defendant traveled between 200 and 250 feet while plaintiff was traveling approximately thirty-five feet. Defendant's evidence shows that although he applied his brakes at the curbing on the west side of St. Lawrence avenue, the speed of his car was so high that the impact when his car struck the left side of plaintiff's car not only badly damaged plaintiff's car but damaged defendant's car beyond repair, and plaintiff's automobile was driven, by the impact, into the yard on the northeast corner of the intersection. Plaintiff saw defendant approaching when the latter was between 200 and 250 feet away from the intersection, and the jury were fully warranted in assuming that defendant saw plaintiff as the latter approached and entered the intersection in ample time to reduce the high speed of his car and thus avoid the collision.

We find no merit in the contention of defendant that the judgment should be reversed because the verdict of the jury is against the manifest weight of the evidence. After a careful consideration of all of the evidence, including that bearing upon the condition of the two automobiles after the impact, we are satisfied that the jury were fully warranted in finding a verdict for plaintiff. Defendant also argues in his brief that the verdict of the jury is not supported by a preponderance of the evidence. The question of preponderance of the evidence does not arise in this court. We cannot disturb the finding of the jury unless it is clearly against the manifest weight of the evidence. Defendant has had a fair trial and the judgment of the circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

WILLIAM J. SULLIVAN, J., CLERK.

41322

I. D. SPAT,
Appellee,

v.

CITY OF CHICAGO, a
Municipal Corporation,
Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

307 I.A. 671

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued to recover damages for personal injuries sustained in a sidewalk accident. A jury returned a verdict finding defendant guilty and assessing plaintiff's damages at \$1,100. Defendant appeals from a judgment entered upon the verdict.

Defendant raises no point on the pleadings. Plaintiff claimed that he sustained certain injuries because the City negligently and carelessly permitted and allowed the sidewalk on the west side of South Racine avenue, at a point approximately six inches, more or less, south of the south curb line of West 62d street and four feet, more or less, west of the west curb line of South Racine avenue, "to be and remain out of repair, worn, broken, cracked, depressed, with a hole or cavity therein, dangerous and unsafe for travel thereon, all of which facts the defendant *** knew, or in the exercise of ordinary care should have known in sufficient time to have repaired and remedied the same" before the accident to plaintiff; that by reason of defendant's said negligent conduct, while plaintiff was passing upon, along and over the said sidewalk and while he was then and there in the exercise of ordinary care for his own safety and as a result of the said condition of the sidewalk, plaintiff tripped, stumbled, was thrown and fell to and upon the ground with great force and violence; that he thereby sustained certain injuries alleged in the complaint.

After the verdict of the jury was returned plaintiff discharged his attorney and the trial court entered an order upon defendant to serve notice of all motions on plaintiff. Plaintiff, a layman,

THE COURT OF APPEALS

IN THE COURT OF APPEALS

OF THE STATE OF NEW YORK

IN SENATE CHAMBERS

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THE PEOPLE OF THE STATE OF NEW YORK, PLAINTIFFS,

vs. JOHN J. BROWN, DEFENDANT.

Comes now the defendant, John J. Brown, and moves the court for an order that the plaintiff be compelled to produce the original of the document in dispute.

And in support of his motion he offers the following evidence: That the document in dispute is a copy of a letter from the plaintiff to the defendant, dated the first day of January, 1900, and containing the following substance: 'I have the honor to acknowledge the receipt of your letter of the 28th inst., and in reply to inform you that the same has been forwarded to the proper authorities for their consideration.'

The defendant further offers in support of his motion the following evidence: That the document in dispute is a copy of a letter from the defendant to the plaintiff, dated the first day of January, 1900, and containing the following substance: 'I have the honor to acknowledge the receipt of your letter of the 28th inst., and in reply to inform you that the same has been forwarded to the proper authorities for their consideration.'

The court, upon consideration of the evidence offered, is of the opinion that the defendant's motion should be granted, and it is so ordered.

After the verdict of the jury was returned in favor of the plaintiff, the defendant moved for a new trial, on the ground that the verdict was against the weight of the evidence.

There is not the slightest merit in this appeal. Plaintiff introduced evidence that showed clearly that the sidewalk at the place in question at the time of the accident was so broken up and out of repair that it was dangerous and unsafe for pedestrians to walk thereon. Kenneth Prather, who lived on the lot next to the corner in question, testified that this condition had existed for five or six years. Defendant made no attempt to contradict the testimony introduced by plaintiff as to the condition of the sidewalk. In fact, counsel for defendant agreed that certain photographs offered by plaintiff might be introduced without objection. These photographs show clearly how badly broken up and dangerous the sidewalk was at the place in question. Plaintiff testified that he resided at 5530 South Racine avenue; that he very seldom had occasion to go south on Racine avenue and that he could not recall that he ever noticed the defective condition of the sidewalk at the place of the accident; that on September 14, 1937, between the hours of 8 and 8:15 P.M., he left his home and walked south on the sidewalk on the west side of Racine avenue; that when he reached 62d street and Racine avenue he turned to cross over 62d street and while he was still on the sidewalk it "undercaved" under him and he stumbled and fell; that

...in fact, counsel for defendant agreed that certain photographs
offered by plaintiff might be introduced at trial. These
photographs show clearly how badly broken up and dangerous the sidewalk was at the place in question. Plaintiff testified that he
resided at 2530 North Madison Avenue, that he very seldom had occasion
to go south on Madison Avenue and that he could not recall that he ever
visited the defendant residence at the sidewalk at the place of the
accident, that on September 14, 1937, between the hours of 2 and 3
P.M. he left his home and walked south on the sidewalk on the west
side of Madison Avenue, that when he reached 6th Street and heading
north he turned to cross over 6th Street and while he was still on
the sidewalk it "suddenly" under him and he fell and fell; that

there is not the slightest merit in this appeal. Plaintiff
left important evidence that showed clearly that the sidewalk at
the place in question at the time of the accident was so broken up
and out of repair that it was dangerous and unfit for pedestrian
use. Plaintiff, however, who lived on the lot next to the
house in question, testified that this condition had existed for
five or six years. Plaintiff was in fact negligent in not
causing the sidewalk to be repaired at the place
in question. In fact, counsel for defendant agreed that certain photographs
offered by plaintiff might be introduced at trial. These
photographs show clearly how badly broken up and dangerous the sidewalk
was at the place in question. Plaintiff testified that he
resided at 2530 North Madison Avenue, that he very seldom had occasion
to go south on Madison Avenue and that he could not recall that he ever
visited the defendant residence at the sidewalk at the place of the
accident, that on September 14, 1937, between the hours of 2 and 3
P.M. he left his home and walked south on the sidewalk on the west
side of Madison Avenue, that when he reached 6th Street and heading
north he turned to cross over 6th Street and while he was still on
the sidewalk it "suddenly" under him and he fell and fell; that

he twisted his right ankle and hurt his left elbow, and remained where he had fallen; that Dr. Frather and a few other men lifted him from the sidewalk and placed him on the stairway at 4202 South Racine Avenue, and about twenty minutes thereafter Frather took him to the Menrotin hospital, where he remained for about four weeks. Frather testified that he did not see plaintiff fall, but he saw him when he was "down on the sidewalk and there were other people around there;" that plaintiff was groaning and seemed to be in pain; that plaintiff could hardly move one of his legs; that he took plaintiff to the Menrotin hospital. Defendant offered no evidence as to the accident.

Defendant contends that the trial court erred in refusing to give the following instruction offered by it: "The jury are instructed that the City is not liable for latent or unseen defects in the sidewalks which are not discoverable by the exercise of reasonable care, and if you believe from the evidence in this case that the sidewalk in question was, at the time of the alleged accident, in a reasonably safe condition so far as it was discoverable by the exercise of reasonable care, then you should find the defendant, the City of Chicago, not guilty, disregarding all other questions." The trial court very properly refused to give the instruction, upon the ground that it had no applicability to the facts of the case.

There is no merit in defendant's contention that the evidence failed to show that plaintiff was in the exercise of due care and caution for his own safety at the time of the injury and that therefore the motion by defendant for a directed verdict in its favor should have been allowed. Under the undisputed facts in the case it was for the jury to pass upon the question of contributory negligence. "The general rule is that negligence and contributory negligence are questions of fact for the jury, and so long as a question remains whether either party has performed his legal duty or has observed that degree of care and caution imposed upon him by law, and the determination of the question involves the weighing and consideration of evi-

he testified his right arm and hand his left elbow, and remained
about he had fallen; that Mr. Trotter and a few others were lifted
him from the sidewalk and placed him on the sidewalk at about 10:30
p.m. about 10:30 p.m. about 10:30 p.m. about 10:30 p.m. about 10:30 p.m.
to the sidewalk, about he remained for about two weeks.
Further testified that he did not see Plaintiff call, but he was
him when he was "down on the sidewalk and there were other people
around there"; that Plaintiff was standing and seemed to be in pain;
that Plaintiff would hardly move one of his legs; that he could plain-
tiff to the hospital. Plaintiff returned to the hospital as in
the evidence.

Defendant contends that the trial court erred in refusing
to give the following instruction offered by the "The jury are in-
structed that the city is not liable for injury or damage to
the sidewalk which is not the responsibility of the owner of
reasonable care, and if you believe from the evidence in this case
that the sidewalk in question was, at the time of the alleged accident,
in a reasonably safe condition so far as it was discoverable by the
exercise of reasonable care, then you should find the defendant, the
City of Chicago, not guilty, disregarding all other questions." The
trial court very properly refused to give the instruction, and the
ground that it had no applicability to the facts of the case.

There is no merit in defendant's contention that the city
cannot be held to show that Plaintiff was in the condition of the case
and caused the injury as a result of the fact that the injury was the
result of the action of Plaintiff who is alleged to have been in the
condition of the case. Under the well-known rule in this case it
was for the jury to pass upon the question of contributory negligence,
and the ground that it had no applicability to the facts of the case.
The ground that it had no applicability to the facts of the case.
The ground that it had no applicability to the facts of the case.

dence, the question must be submitted as one of fact. (Chicago, St. Louis and Pittsburg Railroad Co. v. Hutchinson, 130 Ill. 587; Anatin v. Public Service Co. ante, p. 112.) Before we can say, as a matter of law, that there was no negligence on the part of the defendant or that there was such contributory negligence on the part of the plaintiff as to defeat recovery, we must be able to say that all reasonable minds must agree that the defendant was not negligent in his acts or that the injury was the result of plaintiff's own negligence.' (Petre v. Hines, 299 Ill. 236, 240. See, also, Pollard v. Broadway Central Hotel Corp., 353 Ill. 112, 322, 323.)" (Thomason v. Chicago Motor Coach Co., 292 Ill. App. 104, 110.) The jury were fully instructed on the subject of contributory negligence and by their verdict they found that plaintiff was in the exercise of ordinary care. Under the facts it is clear that we would not be justified in holding that all reasonable minds must agree that plaintiff was not in the exercise of due care and caution for his own safety at the time of the accident.

The last contention of defendant is that the evidence fails to disclose that the injuries claimed to have been sustained by plaintiff were caused by the accident in question. Upon his direct examination plaintiff voluntarily testified that he had had several accidents prior to the one in question and that he sustained injuries in each of them. It is upon this evidence that plaintiff bases the instant contention. Defendant does not contend that the damages awarded are excessive, and it is very clear that they are not. Plaintiff paid the Henrotin hospital \$187.57. Dr. John A. Graham, who attended him at the Henrotin hospital and after he left the hospital, rendered plaintiff a bill for \$367. The jury assessed plaintiff's damages in the sum of \$1,100. The amount allowed plaintiff for his injuries was only \$545.43. Plaintiff has been for many years "a post operative mechanical therapist." He works for doctors and after an operation has been performed upon a patient his work is "to loosen up the muscles and permit

[illegible]

functioning." Dr. John A. Graham, who treated plaintiff after the accident, testified that when he saw plaintiff, about 9:30 o'clock of the evening of the accident, he found that plaintiff had an injury to his right ankle; that the ankle was markedly swollen, painful and rigid; that there was an injury to plaintiff's left arm and to his left shoulder, and he also found minor body bruises. The doctor further testified that the injury to the ankle affected the tendons of the soft tissue and that it took some time for this trouble to clear up, but he thought that it was cleared up at the time of the trial. He further testified that he caused an X-ray photograph of plaintiff's left elbow to be made and that the photograph showed a comminuted fracture of the inner condyle, otherwise called the "funny bone;" that there is now a union of the pieces of bone, although some of the fragments are slightly displaced. The doctor further testified that in his opinion the injury to plaintiff's elbow is permanent. Plaintiff testified that for some years prior to the accident he had a hernia but that it did not bother him before the accident and it was not necessary for him to wear a truss. While plaintiff was in the hospital Dr. Graham found that the hernia had become decidedly aggravated and required an operation, and he performed one on September 27, 1937. Plaintiff testified that after he fell to the sidewalk he felt a pain in the right ankle, pain in his elbow, and a severe pain over the left side of the intestines. Plaintiff contends that the accident aggravated his hernia, but in our view of the amount awarded plaintiff this particular claim may be entirely disregarded. Plaintiff testified that it was not until a year after the accident that he was able to do a little work; that he is still unable to handle cases involving ankylosis of the knees because of the injury to his elbow. The doctor also testified that he treated plaintiff from the time the latter entered the hospital until May 5, 1938. Dr. Graham has practiced his profession in Chicago for a great many years. He is the chief surgeon of the Benet Hospital and is

on the staff of the Children's Memorial hospital and the Illinois Central hospital. In our judgment, defendant should be well satisfied with the amount of the damages awarded by the jury, and plaintiff might very justly complain of the amount of the verdict. The small amount awarded was due, in our opinion, to the character of the argument made by defendant's counsel to the jury. He called plaintiff "an ordinary fraud, a faker, a charlatan," and he accused plaintiff and "his friend Dr. Graham" of building up a case "from start to finish - with one avowed purpose, and that is to stick the City." He stated that the alleged accident was a fraud and the alleged injuries, a build-up; that after the pretended accident plaintiff went to his friend Dr. Graham because he knew the doctor had a convenient memory and would do everything in the world to help plaintiff in the case. The only defense that defendant offers to this vicious and unjustified argument is that plaintiff's attorney made no objection to any part of it. It is true that plaintiff's attorney was derelict in this regard, and we cite the argument because it seems to be the only likely explanation of the inadequate amount of damages awarded plaintiff.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

on the part of the defendant's counsel and the Illinois
General Hospital. In our judgment, defendant should be well
satisfied with the amount of the damages awarded by the jury, and
plaintiff's claim very largely exceeds the amount of the verdict.
The small amount awarded was due, in our opinion, to the character
of the argument made by defendant's counsel to the jury. He called
plaintiff "an ordinary fellow, a fellow, a character," and he called
plaintiff and his friend Dr. Brown "a pair of scoundrels" and
said to finish - with one covered gunshot, and that is to finish the
city." He stated that the alleged accident was a fraud and the
alleged injuries, a collusion; that after the pretended accident
plaintiff went to his friend Dr. Brown because he knew the doctor
had a substantial money and would do everything in the world to help
plaintiff in the case. The only defense that defendant offers in
this criminal and aggravated argument is that plaintiff's counsel
made no objection to any part of it. It is true that plaintiff's
attorney was defaulted in this regard, and we also the argument
because it seems to be the only likely explanation of the inadequate
amount of damages awarded plaintiff.
The judgment of the circuit court of Cook County is
affirmed.

ROBERT H. HARRIS,

Friend, V. L. and Sullivan, J., counsel.

41337

REGINALD V. DUCKETT,
(Plaintiff)

Appellee,

CHICAGO AND WEST TOWNS RAILWAYS,
INC., a corporation, SIRO GHILARDI,
LOUISE GHILARDI and SOPHIE ANDREWS,
Defendants.

APPEAL FROM

SUPERIOR COURT OF

LOUISE GHILARDI,
(Defendant)

Appellant.

COOK COUNTY.

307 L.A. 671²

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued Louise Ghilardi, appellant, and others, for damages growing out of a collision between plaintiff and the automobile of appellant. The accident occurred at the intersection of 52d avenue and 22d street in Cicero, Illinois, on December 28, 1937. As a result of the accident it was necessary to amputate the right leg of plaintiff. Before the trial of the cause plaintiff dismissed the suit as to defendants Siro Ghilardi and Sophie Andrews. At the time of the trial of the cause plaintiff dismissed the suit as to defendant Chicago and West Towns Railways Company, Inc. A jury returned a verdict finding Louise Ghilardi, defendant, guilty and assessing plaintiff's damages at the sum of \$2,500. Defendant appeals from the judgment entered upon the verdict. Plaintiff, appellee, has not filed a brief in this court.

The accident occurred about 2:30 a.m. Plaintiff had been visiting a lady friend in Chicago and left her after midnight. He then took a street car that took him to the northeast corner of 52d avenue and 22d street, in Cicero. He got off of the car on the northeast corner of the intersection of said streets in order to take a bus of the Chicago and West Towns Railways, Inc., which would take him to his ultimate destination. The busses of the Chicago and West Towns Railways, Inc., traveled west on 22d street until they reached

10037

LOUISE GHILARDI
(Plaintiff)

vs.

CHICAGO AND WEST TOWNS RAILWAYS,
INC., a corporation, City of Chicago,
LOUIS GHILARDI and SOPHIE ANDREWS,
Defendants.

LOUISE GHILARDI
(Defendant)

Appellant.

30714571
COURT COUNTY

MR. JUSTICE SCAMMAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued Louise Ghilardi, appellant, and others,

for damages growing out of a collision between plaintiff and the
automobile of appellant. The accident occurred at the intersection
of 32d Avenue and 32d Street in Chicago, Illinois, on December 28,

1937. As a result of the accident it was necessary to separate
the right leg of plaintiff. Before the trial of the cause plaintiff
dismissed the suit as to defendants Siro Ghilardi and Sophie Andrews.
At the time of the trial of the cause plaintiff dismissed the suit

as to defendant Chicago and West Towns Railways Company, Inc. A jury
returned a verdict finding Louise Ghilardi, defendant, guilty and
assessing plaintiff's damages at the sum of \$2,700. Defendant appeal
from the judgment entered upon the verdict. Plaintiff, appellee,
has not filed a brief in this court.

The accident occurred about 2:30 a.m. Plaintiff had been
visiting a lady friend in Chicago and left her after midnight. He
then took a street car that took him to the northeast corner of 32d
Avenue and 32d Street, in Chicago. He got off of the car on the
northeast corner of the intersection of said streets in order to take
a bus of the Chicago and West Towns Railways, Inc., which would take
him to his ultimate destination. The buses of the Chicago and West
Towns Railways, Inc., traveled west on 32d Street until they reached

said intersection, where they made a left turn and proceeded south on 52d avenue. Plaintiff testified that he stood on the northeast corner for about twenty minutes before a bus pulled up to the intersection; that when it reached the intersection he waived to the bus but that before he could reach it he was struck by the automobile of defendant; that before he started for the bus he looked to the left and did not see any automobile but he thought that he heard one; that, as to the lights at the intersection, he "looked and there were no lights there. They were not operating and when they did operate, they stayed green all around. I did not see any stop and go lights." The theory of fact of defendant was that plaintiff was not standing at the northeast corner of the intersection when the bus reached the intersection; that the bus reached the intersection and stopped; that the lights were operating properly before the accident and at the time of the accident; that when the bus reached the intersection the east and west lights were red; that when the east and west lights turned green the bus started to make a left turn on 52d avenue, that as it was making the turn plaintiff rushed from the sidewalk in order to catch the bus and that as he was rushing for the bus he was struck by defendant's automobile, which was proceeding westward on 22d street with the green light in its favor, and that the movement of plaintiff from the sidewalk to a point in front of defendant's automobile was made so quickly that defendant had no opportunity of stopping the automobile in time to avoid the accident; that defendant stopped her automobile and took plaintiff to the hospital.

Defendant strenuously contends that the accident was occasioned solely through the negligence of plaintiff and that defendant was guilty of no negligence whatsoever; that plaintiff failed to make out a prima facie case against defendant and that therefore the trial court erred in failing to instruct the jury to find defendant not guilty on defendant's motion, made at the close of plaintiff's testimony, and also a like motion made at the close of all of the

and intersection, where they made a left turn and proceeded south on 32d Avenue. Plaintiff testified that he stood on the northeast corner for about twenty minutes before a bus pulled up to the intersection; that when it reached the intersection he walked to the bus but that before he could reach it he was struck by the automobile of defendant; that before he started for the bus he looked to the left and did not see any automobile but he thought that he heard one; that, as to the lights at the intersection, he "looked and saw" that there were no lights there. They were not operating and when they did operate, they stayed green all around. I did not see any stop and go lights." The theory of fact of defendant was that plaintiff was not standing at the northeast corner of the intersection when the bus reached the intersection; that the bus reached the intersection and stopped; that the lights were operating properly before the accident and at the time of the accident; that when the bus reached the intersection the east and west lights were red; that when the east and west lights turned green the bus started to make a left turn on 32d Avenue, that as it was making the turn plaintiff rushed from the sidewalk in order to catch the bus and that as he was rushing for the bus he was struck by defendant's automobile, which was proceeding westward on 32d street with the green light in its favor, and that the movement of plaintiff from the sidewalk to a point in front of defendant's automobile was made so quickly that defendant had no opportunity of stopping the automobile in time to avoid the accident; that defendant stopped her automobile and took plaintiff to the hospital.

Defendant strenuously contends that the accident was occasioned solely through the negligence of plaintiff and that defendant was guilty of no negligence whatsoever; that plaintiff failed to make out a prima facie case against defendant and that therefore the trial court erred in failing to instruct the jury to find defendant not guilty on defendant's motion, made at the close of plaintiff's testimony, and also a like motion made at the close of all of the

evidence. The argument in support of this contention is not without some force, but, following the well-established rules that govern motions to direct a verdict, we have reached the conclusion that we would not be justified in holding that the trial court erred in failing to direct a verdict for defendant.

Defendant contends that in any event it must be held that the verdict is contrary to the manifest weight of the evidence. This contention is clearly a meritorious one and must be sustained. We agree with defendant that it is difficult to understand how a fair and intelligent jury could have reached a verdict for plaintiff under all of the evidence in the case. There is merit in defendant's argument that the amount awarded plaintiff, \$2,500, is such inadequate compensation for the loss of a young man's right leg that it is apparent that the verdict was "a sympathy verdict not predicated upon the evidence, but a desire on the part of the jurors to give to the plaintiff some compensation for his serious injury." The evidence shows that plaintiff's hospital bill was \$230, his doctor's bill was \$150, and the cost of an artificial leg was \$76, so that it appears that the jury awarded plaintiff only \$2,044 for the loss of his leg. After the evidence in this case has been carefully considered it is not difficult to understand why plaintiff has not seen fit to defend the instant judgment.

It would be a grave injustice to defendant to permit the instant judgment to stand, and it is accordingly reversed, and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE
REMANDED FOR A NEW TRIAL.

Friend, P. J., and Sullivan, J., concur.

Friend, P. J., and Sullivan, J., concur.

JUDGMENT REVERSED AND CAUSE
REMANDED FOR A NEW TRIAL.

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that the amount awarded plaintiff, \$2,700, is such inadequate compensation
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intelligent jury could have reached a verdict for plaintiff under all
agree with defendant that it is difficult to understand how a jury and
contention is clearly a meritless one and must be sustained. We

the verdict is contrary to the manifest weight of the evidence. This
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to direct a verdict for defendant.

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motions to direct a verdict. We have reached the conclusion that we
some force, but, following the well-established rules that govern
evidence. The argument in support of this contention is not without

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